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THE RIGHT TO COUNSEL AND THE FOURTEENTH AMENDMENT: A DIALOGUE ON "THE MOST PERVASIVE RIGHT" OF AN ACCUSED*

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The two elders came . . . full of mischievous imagination against Susanna; and said before the people, "Send for Susanna, the daughter of Chelcias, Joacim's wife."

Then the two elders stood up in the midst of the people, and laid their hands upon her head. . . . And the elders said, As we walked in the garden alone, this woman came in with two maids, and shut the garden doors, and sent the maids away. Then a young man, who there was hid, came unto her, and lay with her. . . . And when we saw them together, the man we could not hold: for he was stronger than we, and opened the door, and leaped out. But having taken this woman, we asked who the young man was, but she would not tell us: these things do we testify.

Then the assembly believed them, as those that were the elders and judges of the people: so they condemned her

Then Susanna cried out with a loud voice, and said, O everlasting God, that knowest the secrets . . . thou knowest . . . I never did such things as these men have maliciously invented against me.

And the Lord heard her voice.

Therefore . . . the Lord raised up the holy spirit of a young youth, whose name was Daniel

The History of Susanna
APOCRYPHA (A.V.)

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THE reader will recall that Daniel "convicted Susanna's accusers of false witness by their own mouth," but if the elders had invoked the reasoning of *Betts v. Brady*,¹ the story might have ended this way:

So Daniel standing in the midst of them said, Are ye such fools that ye have condemned a daughter of Israel without affording her the aid of counsel? Return again to the place of judgment.

But one of the elders rose up and said, O sons of Israel, hear me. While want of counsel in a particular case may *happen* to result in a judgment offensive to fairness, we cannot say that the law of Moses embodies an inexorable command that in every trial for every offense the accused must be so represented.

Then the second elder rose up and said, *What more* could counsel do for Susanna in this case? The simple issue was the veracity of her testimony and that of her accusers. The daughter of Chelcias is not helpless but a mature woman of ordinary intelligence. Surely, she had the ability to take care of her own interests on the trial of that narrow issue.

With that all the assembly cried out with a loud voice and praised God. And the people turned again in haste to Susanna and seized her and led her away to be punished.

I. THE EXCLUSIONARY RULES AND THE RIGHT TO COUNSEL²

A. *Due Process Values: Herein of Bread and Cake*

II: Twenty years ago, in discussing the then "current undertakings for revision of federal criminal procedure," one commentator dwelt on "the most important single generalization" that can be made about any civilized criminal procedure:

[I]ts ultimate ends are dual and conflicting. It must be designed from inception to end, to acquit the innocent as readily at least, as to convict the guilty. This presents the inescapable dilemma of criminal procedure which . . . consists in the fact that the easier it is made to prove guilt, the more difficult does it become to establish innocence.³

Δ: There is much truth in this, isn't there?

II: Yes, but as the *Weeks* exclusionary rule in federal search and seizure

¹ 316 U.S. 455 (1942) (particularly at 472). The rule established there is to be reconsidered this term, in *Gideon v. Cochran*, *cert. granted*, 370 U.S. 908 (1962). See also the text at note 215 *infra* and the discussion in notes 23 and 186 *infra*.

² Space limitations preclude consideration in this article of several issues: Whether or not the unqualified right to counsel for those who can afford it may be squared with the need of those who cannot [afford it] to show "special circumstances," *cf.* *Griffin v. Illinois*, 351 U.S. 12 (1956); if the absolute right to assigned counsel is to be extended beyond capital cases, where the new line is to be drawn, *e.g.*, major felonies, or all felonies and misdemeanors short of "petty offenses," *cf.* *District of Columbia v. Clawans*, 300 U.S. 617 (1937); *Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926); and the question of prospective or retroactive operation of a new, broader rule. These and other problems are considered in *Kamisar, Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV.—(1962).

³ J. Hall, *Objectives of Federal Criminal Procedural Revision*, 51 YALE L.J. 723, 728 (1942).

cases had already illustrated,⁴ and as later events demonstrated, it is hardly the whole truth.

The very next year, in the exercise of its supervisory powers over the administration of federal criminal justice, the Supreme Court began to reject incriminating statements secured in the course of prolonged pre-commitment detention, however "voluntary" they appeared to be, however reliable, however much they tended to prove guilt.⁵ And the "constant basis" for compelling the exclusion of involuntary confessions in state prosecutions soon proved to be "other than untrustworthiness" and "other than the prejudicial effect," but rather "the demonstrated necessity of deterring invasions of a constitutional right . . . whether one envisages the constitutional invasion as beginning with the extraction of the confession or with the use of the confession at the trial."⁶

Ten years later, the Court barred the use of incontestably reliable evidence: the contents of defendant's stomach.⁷ And nineteen years later, the Court imposed the *Weeks* exclusionary rule on all state courts.⁸

I need hardly add that the outcries that have greeted these and other decisions of the Court have been loud and shrill.

Δ: So they have. So they have been in the past. So they will be again. As long as the Court does the things "which we have commonly consented that it should do," it

is certain to collide with firmly-held opinions and deep emotional attachments which themselves find expression in political terms. This in itself makes it certain that the Court periodically must find itself the center of political tempests. Were it otherwise, we might have a real, albeit a different, cause for concern about the current state of health of the judicial power.⁹

⁴ *Weeks v. United States*, 232 U.S. 383 (1914).

⁵ *McNabb v. United States*, 318 U.S. 332 (1943), reaffirmed in *Mallory v. United States*, 354 U.S. 449 (1957).

⁶ Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 325. Indeed, a year before *Betts* was handed down, the Court observed in a famous confession case that "the aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." *Lisenba v. California*, 314 U.S. 219, 236 (1941), quoted with approval in *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960). The doubts to the contrary raised by *Stein v. New York*, 346 U.S. 156, 192 (1953) have since been put to rest. *Spano v. New York*, 360 U.S. 315, 321 (1959); *Blackburn v. Alabama*, *supra*; *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961). See generally Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DE PAUL L. REV. 213, 233-40 (1959); Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1115-21 (1959); Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. CHI. L. REV. 317 (1954); Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411 (1954).

⁷ *Rochin v. California*, 342 U.S. 165 (1952).

⁸ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁹ McGowan, *The Supreme Court in the American Constitutional System: The Problem in Historical Perspective*, 33 NOTRE DAME LAW. 527, 542-43 (1958).

II: This time, at least, the critical clamor is warranted. For while it has become more difficult to prove guilt, it has not necessarily become easier for the innocent to gain acquittal. To put it another way, we could wipe out many of the new "gains" registered in the field of constitutional-criminal procedure without making it more difficult for the innocent to prove their innocence.

Δ: Come, come. Are we going to fight all the old battles over again? Surely, you must recognize that a new dimension has been added to criminal procedure, one transcending the guilt or innocence of the particular defendant. Need I recall the stirring words of Holmes and Brandeis . . .

II: No, please don't. Let me tell you. I am quite familiar with the government's role as "the potent, the omnipresent teacher"¹⁰ and with the argument that it should not "play an ignoble part."¹¹ I also know all about preserving the "judicial process from contamination,"¹² measuring the "quality of a nation's civilization" by its law enforcement methods¹³ and exerting a "claim to a position of moral leadership among the nations."¹⁴ I am aware, too, that somehow "man's spiritual nature" is at stake.¹⁵ That "the rules restricting the police . . . have a symbolic value" that affirms that "even the meanest of us . . . ought to be treated . . . as a creation of God."¹⁶

Do I remember the words of Holmes, Brandeis and Company? How can I forget them? I am almost maddened by the din.

Δ: I don't know what you're proving other than that "a person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."¹⁷

II: Tell me, how good is your memory? Do you remember when the only function of a trial was to determine the guilt or innocence of the individual then standing before the bar of justice? When a criminal trial was a criminal trial, not an interdisciplinary seminar in sociology, history, philosophy, religion, and what have you?

Δ: So you want to go back to the good old days, do you?

II: No, not the very old days. Not back to the time when "the dominant strain . . . was the assumption that the accused was guilty and that it was of great importance to the state to prove him so."¹⁸ So important, that it is

¹⁰ *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

¹¹ *Id.* at 470 (Holmes, J., dissenting).

¹² *Id.* at 484 (Brandeis, J., dissenting).

¹³ Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956) [hereinafter cited as Schaefer].

¹⁴ DOUGLAS, *THE RIGHT OF THE PEOPLE* 157 (1958).

¹⁵ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

¹⁶ Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65, 67 (1957).

¹⁷ *West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 623-33 (1943) (opinion of Jackson, J.).

¹⁸ A. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1152 (1960).

difficult to see how those who were innocent could ever manage to prove it. But the pendulum has since swung too far. Nowadays, we assign such importance to values and policies other than the applicability of the substantive criminal law to the particular facts that too often the state can't convict the defendant when he is "obviously guilty," when he is "caught red-handed."

It has well been said that "the obligation to see that justice is done has a dual aspect . . . that the innocent be acquitted for the sake of the rights of the individual . . . that the guilty be convicted for the sake of the rights of society."¹⁹ In the old days we too often convicted the innocent. That was injustice. Today, we too often turn the guilty loose as an object lesson to the police or prosecutors. This is also injustice.

In the sixteenth and seventeenth centuries not only was the accused incompetent as a witness in his own behalf, but he could not call other sworn witnesses. He had no right to counsel, even when he could afford to hire his own. He could not so much as see the charges against him.²⁰ You might say we deprived him of his very bread. That was bad. Today, we let him eat cake—and lick the frosting, too. This is also bad.

Δ: Here, as elsewhere, the progress of the law has not been even or logical. That the probably guilty, "obviously guilty," if you prefer, are now sometimes freed in the name of man's "dignity" or "individuality" or "privacy" does not mitigate the fact that we have not yet gone as far as we could—and should—to assure that innocent defendants will not be convicted.

Π: I'm not sure I follow you.

Δ: I'm talking about the estimated thirty to sixty per cent (depending on the jurisdiction) of all those charged with crime who can't afford to hire a lawyer.²¹ About the dozen or so states that still do not require the appointment of counsel for all indigent felony defendants.²² About the rule of *Betts v. Brady*, which, absent "special circumstances," does not require the appointment of counsel for indigents in such cases as a matter of fourteenth amendment due process.²³ I am talking about the vagrant, the unemployed, the

¹⁹ McGarr, *The Exclusionary Rule: An Ill Conceived and Ineffective Remedy*, 52 J. CRIM. L., C. & P.S. 266, 267 (1961).

²⁰ J. Hall, *supra* note 3, at 729–30.

²¹ SPECIAL COMM. TO STUDY DEFENDER SYSTEMS, EQUAL JUSTICE FOR THE ACCUSED 80, 134–35 (1959). Another authority has estimated that sixty per cent of criminal defendants are without funds to employ counsel. E. BROWNELL, LEGAL AID IN THE UNITED STATES 83 (1951). In 1961 "almost thirty percent of the defendants in the 34,008 criminal cases in Federal court could not afford counsel. In the District of Columbia, where the Federal District Court hears all felony cases, over half the defendants had to be assigned attorneys." Kennedy, *Judicial Administration: Fair and Equal Treatment to All Before the Law*, 28 VITAL SPEECHES 706 (1962).

²² See notes 76–99 *infra* and accompanying text.

²³ Whether the failure to assign counsel to an indigent defendant violates fourteenth amendment due process "is to be tested by an appraisal of the totality of facts," *Betts v. Brady*, 316 U.S. 455, 462 (1942). "While want of [assigned] counsel in a particular case may result in a conviction lacking in . . . fundamental fairness, we cannot say that [due process]

migratory, about those defendants who still starve for bread—while their more fortunate brethren, not infrequently the professional criminals—eat cake and lick the frosting, too.

Twenty years ago, the same year Jerome Hall described the “inescapable dilemma” of criminal procedure, the Supreme Court handed down a de-

embodies an inexorable command,” as does the sixth amendment in federal prosecutions. *Id.* at 473. See also the authorities collected in note 186 *infra*. This June, in granting a writ of certiorari to the Supreme Court of Florida in *Gideon v. Cochran*, the United States Supreme Court requested counsel “to discuss the following in their briefs and oral argument: ‘Should this Court’s holding in *Betts v. Brady* . . . be reconsidered?’ ” 370 U.S. 908 (1962).

It is now clear that there is a “flat” requirement of assigned counsel in capital state prosecutions. See *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *Uveges v. Pennsylvania*, 335 U.S. 437, 441 (1948); *Bute v. Illinois*, 333 U.S. 640, 676 (1948). But it is not clear *why*. “[T]he crucial inquiry would seem to be not so much the penalties imposed . . . but the *need* for skilled representation. . . . There is little basis for the belief that trials of capital cases, in general, produce greater need than trials of several other categories of serious, non-capital felonies. . . . Indictments charging the accused with such crimes as embezzlement, confidence game, or conspiracy, are likely to place the unrepresented defendant in a far more helpless position.” *Allen, supra* note 6, at 230–31.

Although recent Supreme Court decisions have significantly minimized the showing of prejudice required by *Betts*, *Chewning v. Cunningham*, 368 U.S. 443 (1962); *McNeal v. Culver*, 365 U.S. 109 (1961); *Hudson v. North Carolina*, 363 U.S. 697 (1960); *Cash v. Culver*, 358 U.S. 633 (1959); a number of state courts are still applying the *Betts* rule with all its old rigor.

In *Artrip v. State*, 136 So. 2d 574 (Ct. App. Ala. 1962), an appeal *pro se* from a conviction for escaping prison, punishable by life imprisonment, the court found no circumstance in the record which could characterize the trial as “fundamentally unfair.” In support of its decision it pointed, *inter alia*, to appellant’s “native wit,” the “good penmanship” in his supplemental briefs and his reputation for being “a good all round mechanic and electrician.” *Id.* at 576. In *Pogolick v. State*, 141 So. 2d 206 (Ct. App. Ala. 1962) appellant alleged that his conviction (for destroying state property) in the absence of counsel violated due process, but the circuit court denied a motion to prosecute an appeal in forma pauperis without giving any reasons, as required by statutory law. The court of appeals deemed the failure to specify reasons “harmless error” in light of appellant’s own failure (proceeding *pro se*) to specify trial errors in the manner prescribed by statute.

In *Jones v. Cochran*, 125 So. 2d 99 (Sup. Ct. Fla. 1960), the court rejected the conclusion of the commissioner at the habeas corpus hearing that defendant (seventeen and one-half at the time) was denied due process when he pleaded guilty to larceny of an automobile without the aid of counsel, and found no “disregard of fundamental fairness” in the record. “Although admittedly, his intellectual level was not high the fact remains that he had at least reached the ninth grade in school. He had previously experienced minor brushes with the law. . . . The charge against him was relatively simple and easily understood.” *Id.* at 102.

In *Commonwealth ex rel. Simon v. Maroney*, 405 Pa. 562, 176 A.2d 94 (1961) (collateral attack on 1942 conviction), the court found no violation of due process in the acceptance of uncounselled guilty pleas to rape and robbery by an eighteen year old “high grade moron” with an I.Q. of fifty-nine and a “mental age” of nine, nor in his subsequent sentencing, without counsel, to twenty to forty years. Petitioner did not request an attorney and there was a finding that he was aware the court would appoint one if he so desired, but the court chose to dwell primarily on whether the record showed an “ingredient of unfairness.” “There were no ‘intricacies of criminal procedure,’ no ‘improper conduct on the part of the court or prosecuting officials,’ and nothing complicated about the charges of robbery and rape.” *Id.* at 565–66, 176 A.2d at 96. In denying the same petitioner relief, the lower court had cited state precedents for the propositions that neither “youth and inexperience, coupled with a serious charge”; nor “low mentality” “per se establish unfairness” in the absence of counsel. 195 Pa. Super. 613, 616–17, 171 A.2d 889, 890 (1961).

cision, *Betts v. Brady*, which, on that occasion, resolved the dilemma against the innocent defendant who happens to be indigent.

II: Those are harsh words.

Δ: Perhaps I can put it more kindly. It is helpful to view criminal procedural due process as containing two great values or objectives: "the attainment of justice and the containment of power."²⁴

Let me spell that out a little. The first and the more obvious value is "insuring the reliability of the guilt-determining process"—"if there is any consideration basic to all civilized procedures it is this."²⁵ The second and the "more elusive and subtle" is "insuring respect for the dignity of the individual"²⁶ without regard to the reliability of the guilt affixing process—by excluding, for example, coerced confessions, however impressively corroborated, or illegally seized "real" evidence, however inherently trustworthy.

In striving for this second and newer objective the Court has dismayed many by reluctantly making it easier for some guilty persons to be acquitted. At the very time tremendous gains were being made in the search-and-seizure and confession fields, how did the right to counsel fare? You know, the right without which "'his day in court' is an idle expression";²⁷ "by far the most pervasive" of all the defendant's rights "for it affects his ability to assert any other rights he may have";²⁸ the master key to all the rules and procedures designed to achieve the first and older objective of due process—the integrity of the truth-determining process—for these rules "are designed for those who know . . . [them], and they can become a source of entrapment to those who do not."²⁹ The great paradox is that here, by resolving the issue of right to counsel in non-capital state prosecutions the way it has, the Court has chosen not to make it easier for many innocent persons to be acquitted.

In our enthusiasm for new principles, have we forgotten first principles? In our haste to make cake and frosting, have we neglected to open the oven door to check how the bread is baking?

II: There's a good deal to what you say if one accepts your underlying premise that the "fair trial" or "prejudicial error" doctrine of *Betts v. Brady*

²⁴ BARTH, *THE PRICE OF LIBERTY* 26 (1961).

²⁵ Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 *YALE L.J.* 319, 346 (1957). Actually, Professor Kadish is discussing procedural due process generally. Thus, Dean Frank Newman suggests this value would be better characterized as "reliable truth-determining or, broadly, the reliability of the determination making process" in order to avoid measuring "public utilities, TV networks, social security beneficiaries, school teachers, and juvenile delinquents on the scale of procedural rights that gives 100 points to alleged murderers and zero points to an unwanted cabinet official"; and in order to achieve "an awareness that due process sometimes should give people more rights than criminal proceedings ensure," e.g., pretrial discovery. Newman, *The Process of Prescribing "Due Process"*, 49 *CALIF. L. REV.* 215, 219–20 (1961).

²⁶ Kadish, *supra* note 25, at 347.

²⁷ BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 1 (1955).

²⁸ Schaefer 8.

²⁹ *Ibid.*

simply cannot do the job it purports to do: adequately protect the uncounselled defendant. But that is the question. "Subtle question-begging is nevertheless question-begging."³⁰

Δ: I think it's fairly obvious to any lawyer who takes the time to think about it that *Betts* rests on fundamental misconceptions about law suits and lawyers:

To say that trials without counsel can be fair is to assume either that the defense which counsel might have presented would not have changed the result in the case or that in certain types of cases counsel serves no useful function. The first assumption is hindsight and unprovable. The second, if true, would convict a portion of the bar of taking money under false pretences in all those "simple" cases where counsel accepts a retainer but apparently cannot influence the result. We cannot with justice keep the existing "fight" theory of criminal law and force the indigent defendant to fight alone.³¹

Π: Again, strong words. But again I must point out that emotive question-begging is nevertheless question-begging.

B. *The Addressees of the Court's Commands*

Δ: I'm sure we can agree on this much: You will not be able to say of the case that overrules *Betts* and requires the furnishing of counsel in all felony cases that it rests on the "misconceptions" you and others in your camp insist underlie the Court's work in the search-and-seizure and confession cases.

Π: What "misconceptions" are these?

Δ: The notion that courts can significantly influence police practice has been cited as a "basic" one:

Although a trial judge or prosecutor may well be sensitive to a reversal on appeal, and consequently the reversal may serve to discipline him to avoid error and misconduct in the future, such a reaction cannot reasonably be expected from the police. They are generally insensitive to a court's rejection of evidence merely because of the impropriety of the methods used to obtain it.³²

[T]he average police officer whose confession [and presumably whose search] is declared invalid suffers no embarrassment or loss of prestige. . . . The clearance of a case by arrest . . . is all that really matters so far as the average policeman is concerned; what happens thereafter is the responsibility of the prosecutor and the courts.³³

³⁰ *Shapiro v. United States*, 335 U.S. 1, 51 (1948) (Frankfurter, J., dissenting).

³¹ BEANEY, *op. cit. supra* note 27, at 234-35.

³² Inbau, *Restrictions in the Law of Interrogation and Confessions*, 52 NW. U.L. REV. 77, 78 (1957).

³³ Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 461-62 (1948). To the same effect is Waite, *Judges and the Crime Burden*, 54 MICH. L. REV. 169, 194 (1955). But see Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories"*, 53 J. CRIM. L., C. & P.S. 171, 179-82 (1962).

When the *Betts* rule is the topic for discussion we are talking about furnishing counsel at arraignment, at trial, and at sentencing. We are dealing with the responsibilities of those officials—prosecutor and trial judge—whose reaction to reversal on appeal is bound to be “to avoid error and misconduct in the future.” Of the many arguments against the exclusionary rule in search-and-seizure cases, the charge that it is merely an exercise in futility is “the most serious assertion of all,”³⁴ but it has little, if any, application to the *Betts* problem.

II: That all depends on when the right to counsel “begins,” doesn’t it? For example, if we adopt the view of four members of the Court that “the demands of our civilization . . . require that the accused who wants a counsel should have one at any time after the moment of arrest,”³⁵ we are right back in the thick of police procedures, aren’t we?

After all, if due process “at any given time includes those procedures that are fair and feasible in the light of then existing values and capabilities,”³⁶ then we can’t talk about due process and “the right to counsel” generally. We must take into account when it “begins.” For the earlier it does the less feasible it becomes to overrule *Betts*.

Δ: And, analytically, the less defensible it becomes not to overrule it. For the further you push back the right to counsel for the one who can afford it, the wider the disparity in treatment between him and the man who cannot. If, “in the light of then existing values” fundamental fairness does require that the person who can afford a lawyer must be given one at any time after his arrest, how in the world can you continue to deny counsel to the indigent at that stage and each and every subsequent stage? If the right to counsel were to arise immediately after arrest, the number of “might have been” factors lost to the indigent by the absence of counsel would so approach the infinite, that even you would agree that he would necessarily be “prejudiced.”³⁷ Do you propose, that—without regard to “coercion”—we exclude all confessions obtained from uncounselled defendants who can hire a lawyer, but that—absent a showing of “coercion”—any incriminating statement the police manage to elicit from an uncounselled indigent defendant is admissible? Is this your idea of due process? Of equal protection?

II: We both know what I propose: absent a showing of “coercion,” any statement comes in, whether taken from rich or poor.

³⁴ Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L., C. & P.S. 255, 257 (1961). See also Allen, *Due Process and State Criminal Procedures: Another Look*, 48 NW. U.L. REV. 16, 34 (1953); Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, 1961 U. ILL. L.F. 78, 105.

³⁵ *Crooker v. California*, 357 U.S. 433, 448 (1958) (Douglas, J., dissenting).

³⁶ Schaefer 6.

³⁷ Cf. Beaney, *Right to Counsel before Arraignment*, 45 MINN. L. REV. 771, 778, 780 (1961).

Δ: Yes, and we both know that all this talk about when the right to counsel "begins" is a desperate skirmish on your part to avoid the main engagement: the right to counsel at arraignment, trial and sentencing. That it may not presently be feasible to provide counsel for an indigent immediately after arrest hardly proves that it is unfeasible to do so at sentencing, at the trial, at arraignment,³⁸ or even immediately after indictment or information.

All I ask is that the right to counsel—wherever it now begins as a matter of fourteenth amendment due process for the defendant who can afford it, and the capital defendant and others in the "special circumstances" category who cannot—be extended to all indigent felony defendants. The fact that (as even those who welcome the imposition of the exclusionary rule on state courts readily admit) many of the present federal rules governing search and seizure are "confusing . . . underdeveloped or over-refined"³⁹ did not stay the Court's hand in *Mapp*. Nor did the uncertainty about just where the right to counsel "begins"—or "ends"⁴⁰ stop the Court from handing down *Johnson v. Zerbst*,⁴¹ or the due process cases of *Powell v. Alabama*⁴² and *Chandler v. Fretag*,⁴³ for that matter. Why must the Court now thoroughly illuminate all the dark edges of the right to counsel in order to overrule *Betts v. Brady*?

³⁸ "Nobody knows better than an attorney general or a prosecuting attorney that in this day and age furnishing an attorney to those felony defendants who can't afford to hire one is 'fair and feasible' [alluding to *Schaefer* 6]. . . . As chief law enforcement officer of one of the 35 states which provide for the appointment of counsel for indigents in *all* felony cases, I am convinced that it is cheap—very cheap—at the price. I can assure you that such a requirement does not disrupt or otherwise adversely affect our work." Letter from Walter F. Mondale, Attorney General of Minnesota, to Richard W. Ervin, Attorney General of Florida, Aug. 15, 1962, on file in Minnesota Law Library, declining Ervin's invitation to submit an amicus curiae brief in his behalf in *Gideon v. Cochran*, *cert. granted*, 370 U.S. 908 (1962). Mondale's letter is reprinted in part in the *Washington Post*, Aug. 26, 1962, p. E6, col. 1 (editorial).

³⁹ Traynor, *supra* note 6, at 329.

⁴⁰ Recent Supreme Court per curiam opinions holding it improper for federal courts of appeals to deny petitions for leave to appeal in forma pauperis where the denial resulted from a hearing at which the indigent lacked either counsel or a trial transcript have produced "considerable disagreement among the lower federal courts as to the proper rationale of these cases [*e.g.*, statutory basis, sixth amendment right to counsel, fifth amendment due process] . . . and has occasioned doubt as to the present state of the law governing the 'sifting' of indigent appeals. . . ." Comment, 26 U. CHI. L. REV. 454, 455 (1959). Moreover, probably the bulk of indigent appellants are without the aid of counsel in deciding whether to file a petition for certiorari and in preparing one. Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783, 796-97 (1961). "No instance has been found where the Supreme Court appointed counsel before the grant or denial of certiorari." *Id.* at 797. Furthermore, "to date the decisions have not imposed upon the federal district courts an absolute duty to appoint counsel whenever an indigent files papers collaterally attacking a federal conviction." *Id.* at 799.

⁴¹ 304 U.S. 458 (1938) (sixth amendment furnishes indigent right to assigned counsel in all federal "criminal proceedings").

⁴² 287 U.S. 45 (1932).

⁴³ 348 U.S. 3 (1954) (right of state defendant to be heard through own counsel is "unqualified").

II: Do I detect agreement that there is nothing to be said for the view that the right to counsel should begin immediately after arrest?

Δ: Of course, there is something to be said for it. After all, "the public would be outraged by a disclosure that a prosecutor or a police officer had allowed two weeks to elapse before undertaking a thorough investigation of the facts of a case, including the interrogation of the suspect and all available witnesses and such scientific tests as the nature of the case permits."⁴⁴ But I must admit that for the present we cannot expect to push the right to counsel back to the point where it now begins for the prosecution. That we cannot eliminate some of the handicaps confronting the indigent defendant, however, furnishes no excuse for perpetuating others. Some day perhaps, if and when we are living in the best of all worlds (or at least a better one), rich and poor alike will be offered the services of a lawyer immediately after arrest. In the meantime, it is neither necessary nor proper "to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant."⁴⁵

II: I assure you that I regard neither the opportunity "exhilarating" nor the doctrine "distant."

Δ: Come, come. To push the right to counsel back to the point of arrest and to exclude all incriminating statements obtained from an uncounselled defendant any time thereafter as a product of a fourteenth amendment violation would be, in effect, to impose the *McNabb-Mallory* rule⁴⁶ on the states. This, the Court has persistently refused to do.⁴⁷ Indeed, even in capital cases, the view that the right to counsel begins immediately after indictment has yet to command a majority.⁴⁸ And if and when it does, police activities are not

⁴⁴ Beane, *Right to Counsel before Arraignment*, 45 MINN. L. REV. 771, 780 (1961).

⁴⁵ *Spector Motor Service, Inc. v. Walsh*, 139 F.2d 809, 823 (2d Cir.) (L. Hand, J., dissenting), *vacated*, 323 U.S. 101 (1944).

⁴⁶ *McNabb v. United States*, 318 U.S. 332 (1943), as reaffirmed by *Mallory v. United States*, 354 U.S. 449 (1957), operates to exclude from federal trials all incriminating statements obtained during prolonged precommitment detention, whether or not they appear to be "voluntarily" made.

⁴⁷ See the discussion in *Culombe v. Connecticut*, 367 U.S. 568, 600-02 (1961).

⁴⁸ Four concurring Justices took this position in *Spano v. New York*, 360 U.S. 315, 324 (1959), but a majority, in an opinion written by the Chief Justice, did not reach this question since it found "involuntary" the confession obtained in the absence of counsel. However, the Chief Justice had gone even further than the *Spano* concurring Justices in *Crooker v. California*, 357 U.S. 433, 441 (1958). There, he dissented with three other members of the Court on the ground that in a capital case a confession, however "voluntary," must be excluded as the product of a violation of the right to counsel protected by due process when obtained from a suspect whose requests for a specific attorney have been denied.

Relying in part on the *Spano* concurring opinions and in part on the privilege against self-incrimination, the New York courts have barred all incriminating statements obtained from a person in the absence of counsel after he has been charged with a crime. See *People v. Di Biasi*, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960); *People v. Waterman*, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961) (only a "John Doe" indictment); *People v. Meyer*, 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962) (after arraignment).

likely to be greatly affected. Consider, for example, the recent murder cases of *Cicenia v. Lagay*,⁴⁹ *Crooker v. California*⁵⁰ and *Culombe v. Connecticut*.⁵¹ In all three instances it was only after the police had obtained signed written confessions from the petitioners that they were charged with murder.⁵²

I repeat, therefore, that if the Court were to issue a new command in the right-to-counsel field, the addressees will be judges and prosecutors, not policemen. If the *Betts* rule is modified or overturned, the police will be more or less out of the picture before the new rule ever comes into play.

II: I hope you are right.

Δ: You know I am. And from the way you've battled me on this point, I think you also know that it represents a big plus factor for intervention in this area of criminal procedure. For although many of the problems that arise in other areas of criminal procedure are beyond the direct control of the courts, if the indigent's right to counsel is enlarged most of the resulting problems will be within the immediate and continuing control of the courts. Therefore, however begrudging a reception Supreme Court and state court decisions have met in the fields of search and seizure and police interrogation, we may confidently expect a prompt, widespread response to a modification or flat overruling of *Betts*.⁵³

II: I suspect that you are even more confident about the overruling than the response to it.

Δ: That I am. Recently, Attorney General Kennedy speculated that "*Mapp v. Ohio* suggests by analogy that a majority may now hold that the Fourteenth Amendment requires states to provide counsel for indigent defendants in all cases involving serious crimes."⁵⁴ I, for one, would have put it a good deal more strongly. Something to the effect that the overruling of *Wolf* creates an a fortiori case for overruling *Betts*.

II: I must say I don't quite see the connection.

ment upon the "short affidavit" of a detective, but before indictment). For a careful analysis of the *Di Biasi* case and the questions it raises, see Rothblatt & Rothblatt, *Police Interrogation: The Right to Counsel and to Prompt Arraignment*, 27 BROOKLYN L. REV. 24, 48-60 (1960).

California has rejected the *Di Biasi* line of cases and admitted post-indictment confessions obtained outside the presence of counsel. *People v. Garner*, 57 Cal. 2d 151, 367 P.2d 680, 18 Cal. Rep. 40 (1961). For a penetrating and comprehensive discussion of the "beginning of right to counsel" problem see Judge Traynor's concurring opinion in *Garner*.

⁴⁹ 357 U.S. 504 (1958).

⁵⁰ 357 U.S. 433 (1958).

⁵¹ 367 U.S. 568 (1961).

⁵² In *Spano v. New York*, 360 U.S. 315 (1959), petitioner disappeared shortly after the homicide occurred, which may explain why the grand jury returned an indictment against him before he was apprehended. Of course, Spano need not have been formally charged so soon. In *Cicenia v. Lagay*, 357 U.S. 504 (1958), the Court upheld a conviction based on a confession elicited from petitioner two and a half years after the homicide occurred but before he was indicted.

⁵³ Cf. Schaefer 17.

⁵⁴ Kennedy, *supra* note 21, at 707.

Δ: The two most powerful arguments against the exclusionary rule generally, and against its imposition on state courts as a matter of due process, were: (1) the rule operates to free many guilty, yet (2) it does not accomplish its principal objective: to deter illegal arrests and seizures. As we have seen, since the right to counsel immeasurably insures the reliability of the guilt-determining process, the first argument is plainly inapplicable. As we have seen, too, since judges and prosecutors—not other officials much less sensitive to acquittals and reversals—are entrusted with the task of fulfilling the requirements of counsel prescribed by higher courts, the second argument is also inapposite. But this is not all.

That judges and prosecutors rather than policemen and sheriffs man the front-lines on the right to counsel sector not only disposes of the second argument against the exclusionary rule, but most of the other reasons given for opposing the rule as well.

Opponents of the exclusionary rule have complained that judges “second-guess” police officers but do not sufficiently take into account the prompt and decisive responses to “frantic calls for help” and other “split-second” decisions local police must make.⁵⁵ The activities of the F.B.I. and other national law enforcement agencies are distinguished on the ground that their primary function is the gathering of evidence to identify and convict persons after they have committed an offense and, in any event, they have greater manpower and funds for the volume of cases at hand.⁵⁶ Whatever may be said for these factors in other settings, the denial of counsel at arraignment, trial and sentencing can hardly be attributed to haste, zeal or inadequate training.

Critics of the exclusionary rule have also protested that it enables a petty, blundering official to place crucial evidence beyond the reach of the prosecution⁵⁷ and—worse yet—it “plays directly into the hands of corrupt law enforcement officers.”⁵⁸ Apparently, the latter make deliberately illegal raids of, say, brothels and gambling establishments “for the express purpose . . . of . . . tainting and rendering inadmissible the evidence they seize.”⁵⁹ The charge has also been made that the exclusionary rule “has driven the police to methods less desirable than those for which the judges shut truth from the jury’s ears,” e.g., beatings, smashing furniture, and other extra-legal punishment.⁶⁰

⁵⁵ ABA, SUMMARY OF PROCEEDINGS OF SECTION OF CRIMINAL LAW, 108, 110–11 (1961) (Coakley); Inbau, *Restrictions in the Law of Interrogation and Confessions*, 52 NW. U.L. REV. 77, 85 (1957); Peterson, *Restrictions in the Law of Search and Seizure*, 52 NW. U.L. REV. 46, 50, 56 (1957).

⁵⁶ Inbau, *More About Public Safety v. Individual Civil Liberties*, 53 J. CRIM. L., C. & P.S. 329, 331 (1962); Wilson, *Police Arrest Privileges in a Free Society: A Plea for Modernization*, 51 J. CRIM. L., C. & P.S. 395, 398 (1960). But see Kamisar, *Public Safety v. Individual Liberties: Some “Facts” and “Theories,”* 53 J. CRIM. L., C. & P.S. 171 (1962).

⁵⁷ *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardozo, J.).

⁵⁸ Peterson, *supra* note 55, at 57.

⁵⁹ McGarr, *supra* note 19, at 266.

⁶⁰ Waite, *supra* note 33, at 196.

Whether, and to what extent, the aforementioned have been the by-products of the exclusionary rule, it is hard to see how or why an expansion of the right to counsel in indigent cases will bring about any comparable adverse consequences.

C. The Judgment of the States and Other Due Process Criteria

Δ: *Mapp v. Ohio* is illuminating in still another respect: Early colonial history and the views of other English-speaking countries worked against petitioner in the *Betts* case.⁶¹ But one finds even less support in these due process criteria for the exclusionary rule imposed on state courts by *Mapp*.

Before the Revolution, the practice in Connecticut was to appoint counsel, where needed, in all criminal cases, while Pennsylvania, Delaware and South Carolina had significantly advanced beyond the English procedure of the period by providing for the appointment of counsel whenever such aid was requested by a person charged with a capital felony. (Of course, there were then many more such felonies than today.) Shortly after the Revolution, New Hampshire, too, required appointment in all capital cases and New Jersey, by statute, joined Connecticut in granting counsel to indigent defendants generally.⁶²

A rather unimpressive record, I admit, but much less so when you consider that not until the twentieth century did a single state exclude illegally seized evidence.⁶³

Π: It may be that the right to counsel has a thin edge over the exclusionary rule in this regard, but I fail to see how the current English practice aids your cause. Not only has England always admitted illegally seized evidence (as opponents of the exclusionary rule have repeatedly pointed out),⁶⁴ but that same law-abiding, freedom-loving country has never furnished counsel as of right to other than murder defendants. Indeed, its discretionary approach in non-murder cases smacks much of *Betts v. Brady*.

Δ: In England two kinds of certificates may be granted under the Poor Prisoners' Defence Act of 1930: a legal aid certificate which entitles the recipient to the services of a solicitor for the defense of a charge heard summarily or to assist the accused at committal proceedings in indictable cases; and a defense certificate, which (aside from murder cases, where there is an absolute right to counsel) entitles a person committed for trial for an indictable offense to the services of both solicitor and counsel if "it is desirable in the

⁶¹ See 316 U.S. at 465-67, 470-71 n.28. For a general discussion of these due process criteria, see Kadish, *supra* note 25, at 329-30, 333.

⁶² See 316 U.S. at 467 n.20; BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 18-26 (1955).

⁶³ Iowa; see *Wolf v. Colorado*, 338 U.S. 25, 34 (1949) (Table B., App.).

⁶⁴ See, e.g., Inbau, *Public Safety v. Individual Liberties: The Prosecutor's Stand*, 53 J. CRIM. L., C. & P.S. 85, 86 (1962).

interests of justice.”⁶⁵ Prior to 1949, the right to a legal aid certificate was more restricted; it was only granted if the defendant’s means were insufficient and if “by reason of the gravity of the charge or of exceptional circumstances it is desirable in the interests of justice” that he should have free legal aid.⁶⁶ The requirement I have just emphasized—one much like the *Betts* rule⁶⁷—was, from the start, dispensed with in the case of defense certificates and, by virtue of the 1949 Legal Aid and Advice Act, eliminated for legal aid certificates, too.⁶⁸

This suggests that so long as a defendant can establish “insufficiency of means,” he will usually be furnished legal aid. As Lord Devlin said in his Yale lectures:

[T]oday it is very rare that an accused who has any sort of defense to put forward has to prepare and present it without legal assistance. It was not always so. . . .

“Insufficiency of means” is generously interpreted. I think it is true to say that anyone without substantial and visible assets can bring himself within it. Even if an accused has a regular source of income, it very often ceases while he is awaiting trial, because he is either in custody or perhaps suspended from his employment, and so a man who under ordinary conditions would be considered quite well off may often qualify for legal aid. . . .

The fees paid are small and—at the Bar at any rate—are sufficient to attract only youthful talent; but in a case of any complexity or which is otherwise exceptional there is always to be found experienced counsel—sometimes one who would normally command very high fees—willing to serve.⁶⁹

⁶⁵ Poor Prisoners’ Defence Act, 1930, 20–21 Geo. 5, C. 32, § 1 (3)(b). For a discussion of the “desirable in the interests of justice” requirement, see SACHS, *LEGAL AID* 191–96 (1951).

⁶⁶ Poor Prisoners’ Defence Act §2.

⁶⁷ *Cf. Uveges v. Pennsylvania*, 335 U.S. 437, 441 (1948).

⁶⁸ Legal Aid & Advice Act, 1949, 12 & 13 Geo. 6, C. 51, § 18 (2)(a). JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND* (3d ed. 1960), which contains an otherwise good discussion of legal aid in criminal courts, *id.* at 130–46, is misleading in this respect; it indicates that the “grave and exceptional” limits on granting legal aid in Magistrates’ Courts are still in force, *id.* at 133. Section 18 (1) of the 1949 Act also provides that where “there is a doubt whether his means are sufficient to enable him to obtain legal aid or whether it is desirable in the interests of justice that he should have free legal aid, the doubt shall be resolved in favor of granting him free legal aid.”

⁶⁹ DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 127–29 (1958). See also SACHS, *op. cit. supra* note 65, at 191: “The interests of justice are . . . generally regarded by the courts [as meaning] that any prisoner who has a . . . vestige of a defense (whether on facts or on a technical point of law) should be afforded the opportunity to have it put forward in the way made possible by legal aid, so that he is not handicapped by lack of knowledge of legal procedure.”

Consider, too, the recent Address by the Rt. Hon. Lord Parker of Waddington, Lord Chief Justice, Meeting of Magistrates (undated, probably 1960 or 1961), in *GENERAL COUNCIL OF THE BAR, ANNUAL STATEMENT* 31–32 (1961): “In almost every case the interests of the prisoner can only be safeguarded by legal representation and, as you know, subject to a means qualification, he is entitled to it. . . . Thus a defence certificate may be granted

II: A stirring speech, but much of it turns on how you define "any sort of defense" or "a case of any complexity." I'm fairly sure that many of our judges, if asked to tell a British audience about our system of criminal justice, would say much the same thing. How does this prove that overruling *Betts* will be more in accord with British procedure than was the overruling of *Wolf*?

Δ: All I have to prove is that overruling *Betts* would not be in less accord. And that's easy. The Court overruled *Wolf* without even an allusion to modern British law. I am convinced that, in practice at least, the English provisions represent a significant advance over *Betts*,⁷⁰ but even if they do not, in light of *Mapp*, how or why should this prevent the overruling of *Betts*?

II: If you start with the notion that *Mapp* was wrongly decided, as I do, the answer is easy.

Δ: Let's leave England for now, and move on to another due process standard: the judgment of the states.⁷¹ When the Court held in 1914 that "the right . . . to be secure . . . against unreasonable searches and seizures" provided by the fourth amendment included the right to exclude evidence seized in violation of the amendment only one American jurisdiction had so construed comparable state guarantees.⁷² However, when in 1938 the Court held

by committing justices or by Quarter Sessions . . . [which] entitles him to have the services of solicitor and counsel. There is also power at the trial for Quarter Sessions to assign him counsel only to conduct his defence or plea. . . . [T]he power to assign counsel only is to be regarded as in the nature of an emergency power alone. . . . One further matter on discretion. It is sometimes said that in the case of prisoners who are going to plead guilty there must be but few causes where it is desirable in the interests of justice that he should have legal aid. With that I am afraid that I entirely disagree. I would myself put it the other way round and say that even in the case of pleas of guilty there will seldom be a case where it is not desirable in the interests of justice."

⁷⁰ Statistics collected in JACKSON, *op. cit. supra* note 68, at 136 (Table VI) show that legal aid has been given significantly less freely in 1957 than in 1950 (apparently because of the feeling of the justices that there is now less poverty, *id.* at 134-35), but even in 1957, more than two-thirds of the applications for legal aid certificates by Magistrates' Courts for cases heard summarily and by justices for preliminary inquiry were granted; as were almost three-fourths of the applications for defense certificates by justices on committal for trial. *Id.* at 136.

There seems to be no published material bearing on the question whether much, or most, of the refusals to grant legal aid are based solely on the failure to establish "insufficiency of means." If, as Professor S. H. Bate of the University of Birmingham has written me, letter of July 20, 1962, "there is a general tendency in this country for the weekly wage earner to expect free legal aid, even if he can afford to pay for it," then the percentage of applications granted is most impressive. Since administrative steps were taken in 1945 to insure that prisoners were fully aware of their right to legal aid—*e.g.*, printed slips setting forth the availability of legal aid are appended to summonses or handed to persons arrested, notices are displayed in prison cells and courtrooms, see JACKSON, *supra*, at 133; SACHS, *op. cit. supra* note 65, at 203—it is clear that the English practice is well ahead of the American in this respect.

On the basis of correspondence with several English lawyers and law teachers, see Appendix II, *infra* p. 74, my tentative conclusion is that free legal aid is rarely withheld, so long as the applicant establishes the requisite financial need.

⁷¹ See generally Kadish, *supra* note 25, at 330-33.

⁷² See note 63 *supra*.

that the right of the accused "to have the assistance of counsel for his defense" provided by the sixth amendment included the right of indigents to be furnished counsel,⁷³ thirty states already afforded counsel as of right to all indigent felony defendants.⁷⁴

When, last year, the Court invoked the exclusionary rule as a matter of due process, the states were still evenly split on the question.⁷⁵ However, when the Court reconsiders *Betts*, some thirty-seven states—about a three to one margin—provide counsel for all indigent felony defendants regardless of "special circumstances."⁷⁶ In the last four years, Massachusetts, Texas and Colorado have left the *Betts* camp⁷⁷ and, on the basis of recommendations just made by a member of a newly appointed committee, Delaware may soon follow.⁷⁸

⁷³ *Johnson v. Zerbst*, 304 U.S. 458 (1938).

⁷⁴ In an appendix to his dissenting opinion in *Betts*, Justice Black lists 35 states where "there is some clear legal requirement or an established practice that indigent defendants in serious non-capital . . . cases . . . be provided with counsel." This group includes New Hampshire, which then, as now, furnishes assigned counsel in all felony cases punishable by three or more years' imprisonment. N.H. REV. STAT. §604:2 (1955). A study of Justice Black's supporting authorities discloses that four of the jurisdictions categorized by him as providing for assigned counsel in non-capital cases "by judicial decision or established practice judicially approved," *Betts v. Brady*, 316 U.S. 455, 479, are misclassified: Florida, Michigan, Pennsylvania and Virginia. This leaves the 30 states which provided counsel in all felony cases at the time of *Johnson v. Zerbst*.

⁷⁵ See *Elkins v. United States*, 364 U.S. 206, 224-25 (1960) (Table I, App.).

⁷⁶ In an appendix to his concurring opinion in *McNeal v. Culver*, 365 U.S. 109, 119-22 (1961), Mr. Justice Douglas lists 35 states which "provide for appointment of counsel as of course on behalf of an indigent in any felony case." *Id.* at 119. However, in classifying Michigan as one of 15 which have no such provisions. *Id.* at 121-22, Justice Douglas overlooks MICH. CT. R. 35A, adopted June 4, 1947, effective Sept. 1, 1947, which provides that "if the accused is not represented by counsel upon arraignment, before he is required to plead the court shall advise the accused that he is entitled . . . to have counsel, and that in case he is financially unable . . . the court will, if accused so requests, appoint counsel for him." This rule is set forth in 318 Mich. xxxix and quoted in full in *People v. Bumpus*, 355 Mich. 374, 376-77, 94 N.W.2d 854, 855 (1959). Rule 785.3 of the new Michigan General Court Rules, effective January 1, 1963, contains an identical provision.

I am indebted to Samuel J. Torina, Chief Appellate Lawyer, Office of the Prosecuting Attorney, Wayne County, and instructor in criminal law at the University of Detroit, for bringing Rule 35A to my attention. Mr. Torina, Solicitor General of Michigan when *McNeal v. Culver* was handed down, caught the error at once.

Since Mr. Justice Douglas compiled his appendix, Colorado has made appointment of counsel mandatory in all felony cases, COLO. R. CRIM. P. 44, effective Nov. 1, 1961.

⁷⁷ COLO. R. CRIM. P. 44 (1961); MASS. SUP. JUD. CT. GEN. R. 10 (1958); TEX. CODE CRIM. P. art. 494 (Cum. Supp., 1961) (passed in 1959). In addition to the promulgation of Rule 10, in 1960 the Massachusetts Defenders Committee was established. MASS. ANN. LAWS ch. 221, §34D (Cum. Supp., 1961).

⁷⁸ In June of 1962, Deputy Attorney General E. Norman Veasey, a member of a recently appointed Committee of the Superior Court of the State of Delaware presently studying existing and proposed rules for appointment of counsel, completed his report to the Committee, recommending that "counsel should be required to be appointed by the Court in all felonies and in serious misdemeanors." Report, p. 4 (on file in Minnesota Law Library). "The Committee has not yet completed its project and this report represents only my thoughts as an individual." Letter from Mr. Veasey, Aug. 20, 1962.

Two other states are partly out of the *Betts* camp. In New Hampshire, any indigent charged with the commission of an offense punishable by three or more years imprisonment is entitled to assigned counsel.⁷⁹ And, effective the first day of 1962, Maryland Rules of Procedure provide that in cases where the maximum statutory punishment is five or more years imprisonment, counsel shall be assigned to represent indigents.⁸⁰ So thirty-nine states—almost a four-to-one margin—now go beyond the modest requirements of *Betts v. Brady*.

II: My, you certainly like to play the “numbers game.” But one of the problems is that rules and statutes do not necessarily reflect practices at the trial level. For example, so far as the paper record shows, the states were evenly split on the question of admitting illegally seized evidence when *Mapp* was handed down, but there is good reason to think that some trial judges in so-called admissibility jurisdictions were also excluding evidence obtained by improper methods.⁸¹

Δ: Fine. Let’s talk about the practice of furnishing counsel.⁸²

The thirteen jurisdictions whose laws or rules do not require the appointment of counsel in all felony cases without regard to “special circumstances” include the four New England states of Maine, New Hampshire, Rhode Island and Vermont. The practice in these states appears to be almost invariably to furnish counsel to all indigent felony defendants, at least when they so request.⁸³ Indeed, the Rhode Island statute authorizing the public defender to represent indigent defendants is apparently so generally regarded as requiring him to do so that the Attorney General’s office contends Rhode Island has been wrongly classified by the Court.⁸⁴

The Delaware Committee that is currently studying a recommendation to extend the absolute right to counsel to all felony and serious misdemeanor cases is considering, more or less, whether to formalize and crystallize a practice that has already developed in the state. For the current practice is “to appoint an attorney for every person accused of a felony, if he would like such assistance” and apparently “unrepresented felony defendants are always

⁷⁹ N.H. REV. STAT. §604:2 (1955).

⁸⁰ MD. R. P. 719 § b.

⁸¹ See Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 27 n.142.

⁸² The discussion following is based on correspondence with various law enforcement officials. Appendix I contains substantial extracts from this correspondence. See *infra* p. 67. Footnote references are to the names of these officials.

I am indebted to George M. Scott, Hennepin County (Minneapolis) attorney and a Vice-President of the National District Attorneys’ Association (NDAA), for furnishing me a list of NDAA members in those jurisdictions which do not assign counsel as of right in non-capital cases. This list was the starting point for my inquiries as to the practice in those states.

⁸³ See Appendix I *infra* p. 67.

⁸⁴ See Fazzano *infra* p. 73.

asked about this upon arraignment, whether they plead guilty or not.”⁸⁵ Furthermore, “pursuant to a procedure initiated in the Attorney General’s office, most incarcerated and unrepresented defendants are informally asked immediately after [they are formally charged] if they want an attorney appointed, and many appointments can thereby be made before arraignment.”⁸⁶

The most populous state formally in the *Betts* camp is Pennsylvania. Here, too, the practice goes far beyond minimum due process requirements. Philadelphia, of course, is the situs of one of the nation’s great defender associations. Since its organization, a generation ago, the Association has been supplying free counsel in non-capital cases to accused persons committed to prison for want of bail and awaiting trial in the criminal courts of Philadelphia County.⁸⁷ As a member of the District Attorney’s office has observed, “the practice in Philadelphia County practically insures that all indigent defendants in all criminal cases will be represented by the Defender Association.”⁸⁸ In Pittsburgh, if the indigent pleads guilty he is generally but not invariably represented at the time of plea, and if he pleads not guilty he fares still better. The District Attorney’s office now “plays it” so much “on the cautious side” that if an indigent stands trial on a felony charge “we insist that counsel sit at the table even if the accused does not want counsel.”⁸⁹ Throughout the rest of the state, the general practice appears to be to furnish counsel to all indigent felony defendants, at least on request, and to many misdemeanor defendants as well.

Moving on to Maryland, at least in the criminal courts of Baltimore, the usual practice is to supply a court-appointed attorney whenever a felony defendant requests counsel.⁹⁰ Furthermore, as already pointed out, Maryland Court Rules now require the appointment of counsel in all cases punishable by five or more years imprisonment. Thus, in many non-capital cases, an accused now has a right to assigned counsel as a matter of right.

What does this leave us, then? Nothing, but Hawaii, about which I lack sufficient data,⁹¹ and five southern states: Alabama, Florida, Mississippi, North and South Carolina.

⁸⁵ See Bell *infra* p. 67; Veasey *infra* pp. 67–68.

⁸⁶ *Ibid.*

⁸⁷ See Pollock, *Equal Justice in Practice*, 45 MINN. L. REV. 737, 749–52 (1961) (Mr. Pollock is the Philadelphia Defender); Note, *Legal Aid to Indigent Criminal Defendants in Philadelphia and New Jersey*, 107 U. PA. L. REV. 812, 843–53 (1959).

⁸⁸ See Chalfin *infra* p. 71 (that is if “indigent” is narrowly defined as financially unable to post bail).

⁸⁹ See Strauss *infra* pp. 71–72.

⁹⁰ See Harris *infra* p. 70.

⁹¹ Since this text was written, I have received further information from Hawaii which leads me to conclude that the practice there, in *any* felony case, is to advise an uncounselled defendant of the availability of free legal aid at arraignment time and, so long as defendant can satisfy the court of his indigency, then to appoint counsel. See Peters *infra* p. 69; Tanaka *infra* p. 69.

The practice in a number of the larger counties in Florida also goes far beyond the demands of *Betts*. In Dade County (Miami), the largest county in the state, "the Public Defender acts as counsel for all indigent felony defendants who are in jail and unable to make bond," and enters the picture "at or before arraignment."⁹² The same practice prevails for the large counties of Broward (Fort Lauderdale) (public defender)⁹³ and Duval (Jacksonville) (court appointed counsel).⁹⁴ A public defender also operates in Hillsborough County (Tampa), but apparently represents only those who have pleaded not guilty and are awaiting trial.⁹⁵ Thus, despite the presence of a public defender, indigent defendants in this populous county are without counsel at the "critical" arraignment stage.⁹⁶ The practice throughout the rest of the state varies a good deal, but indigent capital defendants, it appears, are not furnished counsel except in the "more serious and the more complicated cases."

There seem to be no distinct patterns or general policies in Mississippi or the Carolinas but at least some Mississippi and North Carolina counties go well beyond the requirements of *Betts*, even if many others do not.⁹⁷ In many, if not most, Alabama counties it appears "the practice," as one prosecutor tersely put it, "is no counsel are appointed except in capital felonies."⁹⁸ Some Alabama judges, however, do appoint counsel in non-capital cases "when the circumstances warrant it."⁹⁹

To sum up, in only a handful of jurisdictions—and even then, not in all parts of those states—does the *Betts* rule hold sway, unmitigated by more liberal practice. When we take into account not only the rules and laws "on the books" in thirty-nine states (including the Maryland and New Hampshire provisions which entitle indigents to counsel in many, although not all, felony cases) but also the almost invariable practice in five other states (Delaware, Maine, Pennsylvania, Rhode Island and Vermont) the "judgment of the states" is overwhelming in favor of extending the right to counsel for indigents beyond the narrow circumstances covered by the *Betts* rule. At no time in the half-century between *Weeks* and *Mapp* could anything like this be said for the exclusionary rule in search-and-seizure cases.

II: My, but you have spent a great deal of time and effort matching *Betts* with *Wolf* and *Mapp*. Interesting? Perhaps. Decisive? Hardly. Even within a distinct area, *e.g.*, involuntary confessions, it has been said that "the process of decision . . . requires more than a mere color-matching of cases."¹⁰⁰ Still less,

⁹² See Gerstein *infra* p. 68.

⁹⁴ See E. Booth *infra* p. 68.

⁹³ See Coker *infra* p. 68.

⁹⁵ See Johnson *infra* p. 68.

⁹⁶ Cf. *Hamilton v. Alabama*, 368 U.S. 52, 53 (1962). See ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 276 (1947).

⁹⁷ See Appendix I *infra* p. 67.

⁹⁸ See C. Booth *infra* p. 67.

⁹⁹ See Riggs *infra* p. 67.

¹⁰⁰ *Reck v. Pate*, 367 U.S. 433, 442 (1961) (Stewart, J.).

much less, can be said for this game when—as here—the cases being matched have been pulled out of different areas, different lines of development.

*D. The Relationship Between the Exclusionary Rules
and the Right to Counsel*

Δ: I could quip that judges who issue warnings against “case matching” often terminate such warnings with a “but” or an “however”; they rarely begin the next sentence with a “therefore.”¹⁰¹ However, I’ll content myself with the observation that whether or not cases from different areas have been matched turns on how one “defines the market.”¹⁰² I define it broadly as criminal procedural due process. The objectives implicit in due process and the criteria for interpreting due process are equally applicable to *Mapp* and *Betts*, are they not? In light of these values and standards, how can you possibly square the two cases?

Π: All right, they are inconsistent. What of it? As one of your favorites has said:

The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.¹⁰³

Δ: Fine. And the law will cease to grow when it fails to absorb new principles or slough off old ones. All I ask is that it continue to grow. And not just for growth’s sake. For there are times—and this is one of them—when new growth is wasted until further growth occurs; when new principles are worthless unless old ones are sloughed off.

If it is true, and I think it is, that since “changing the law is like making a change in the intricate part of a highly organized drama, you cannot change one part without other parts being affected in unexpected ways,”¹⁰⁴ a moment’s reflection brings to the fore another truth: Neither can you leave one part, at least a major part, unaltered without it affecting the other changing parts in unexpected ways.

Π: Do you mind coming down from the clouds?

Δ: I’m talking about “the most pervasive” of all the rights an accused has, remember? Because this is so, the failure to advance on the right to counsel front seriously undermines the advances we have made in other sectors.

¹⁰¹ *E.g.*, *ibid.*

¹⁰² *Cf.* *United States v. E.I. DuPont De Nemours & Co.*, 351 U.S. 377 (1956); 353 U.S. 586 (1957).

¹⁰³ HOLMES, *THE COMMON LAW* 36 (1881).

¹⁰⁴ COHEN, *REASON AND NATURE* 421 (2d ed. 1953).

If you flip the advance sheets you will discover that the following search-and-seizure issues have "become quite commonplace":¹⁰⁵ the extent to which policemen authorized to search premises may search or arrest "late-comers" into the searched premises; the conditions under which an arresting officer may arrest not only his "target" but also "by-standers"; situations in which, even though the arrest of the late-comers may be lawful, a search of their persons may not be. Now really, what if anything, does an untrained, uncounselled layman know about all this?

What does he know about "standing" to object to the admission of illegally seized evidence or about "state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions," which the Supreme Court told us in *Mapp* "must be respected"?¹⁰⁶ What are the landmark search-and-seizure developments going to mean to the uncounselled indigent? Another round of "blindman's buff"?

What does he even know about when an officer does or does not need a warrant? About what constitutes "probable cause"? What amounts to the "fruit of the poisonous tree"?¹⁰⁷ When "voluntary consent" ends and "peaceful submission" to authority begins? When "questioning" or "interviewing" shades into "arresting" or "taking into custody"?¹⁰⁸

As a great state judge, whose own opinion in *People v. Cahan*¹⁰⁹ contributed significantly to the demise of *Wolf*, has observed:

In California alone hundreds of search and seizure cases have come before the appellate courts since the state adopted the exclusionary rule in 1955, and they have compelled detailed articulation of what is reasonable and what is unreasonable. The procession of cases continues, though in diminishing force, just as the procession continues in any other field of the law where the issue of reasonableness turns on a novel combination of facts. There is little chance that the United States Supreme Court would be willing and able to receive fifty such processions marching through its doors, calling upon it to give the details that make up the rules that govern the officials who search and seize. . . .

. . . .

¹⁰⁵ *People v. Perez*, 229 N.Y.S.2d 882 (Sup. Ct. 1962).

¹⁰⁶ *Mapp v. Ohio*, 367 U.S. 643, 659 n.9 (1961).

¹⁰⁷ See *Nardone v. United States*, 308 U.S. 338, 340-41 (1939); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

¹⁰⁸ See Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, 1961 U. ILL. L.F. 78, 115-20; Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, 51 J. CRIM. L., C. & P.S. 385, 389-94 (1960); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 333-34; Weinstein, *Local Responsibility for Improvement of Search and Seizure Practices*, 34 ROCKY MT. L. REV. 150, 168-69 (1962). Cf. Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 63-70.

¹⁰⁹ 44 Cal.2d 434, 282 P.2d 905 (1955) (overturning precedents of more than thirty years' standing to adopt the exclusionary rule).

From whichever way one looks at the problem, from the city hall to the nation's capital, it thus seems reasonable to suppose that it will lie with the state courts to take the initiative in giving meaning to *Mapp*. . . .

....

Even were they a well-developed nucleus, federal rules differentiating the unreasonable from the reasonable in the searches and seizures of federal officials might prove inappropriate on the local scene. It would be all the more inappropriate to apply indiscriminately to the local scene the present confusing federal rules, many of which are underdeveloped or over-refined.¹¹⁰

One of the primary reasons the Court finally imposed the exclusionary rule on the states was the realization that "other remedies have been worthless and futile."¹¹¹ But this, in turn, was largely true because those who felt the brunt of police lawlessness were the vagrants, the migratories, the "youthful imitation gangsters," the slum dwellers, poverty-ridden Negroes, Mexicans and other minority groups.¹¹²

In those states which, absent "special circumstances," don't furnish counsel to non-capital defendants, won't they still feel the brunt? Without the aid of counsel, isn't the new remedy likely to be as "worthless and futile" as the old?

Of course, *Mapp* will not stamp out all illegal arrests and searches. After all, the laws against murder and rape have been on the books a good deal longer and they haven't wiped out those crimes. But whatever can be said for the exclusionary rule generally, what, if anything, can be said for it in those communities dominated by "minority groups without status or power"¹¹³ in those jurisdictions which do not furnish counsel as of right to all indigent felony defendants?

Although no single case has approached *Mapp*'s landmark dimensions, historic changes have surely and steadily been wrought in the confession area, too.¹¹⁴ Recent years have seen a vigilant Court exclude "psychologically coerced" confessions¹¹⁵ that undoubtedly would have gone unchallenged in the days of the crude practices of *Brown v. Mississippi*.¹¹⁶ You and I know this, but does the untutored victim of these more subtle pressures?

¹¹⁰ Traynor, *supra* note 108, at 327-29.

¹¹¹ 367 U.S. at 652.

¹¹² See generally REPORT OF UNITED STATES COMMISSION ON CIVIL RIGHTS, JUSTICE 5-28 (1961); REPORT OF PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 25 (1947); BARTH, THE PRICE OF LIBERTY 160-61 (1961); DEUTSCH, THE TROUBLE WITH COPS 63 (1955); HOPKINS, OUR LAWLESS POLICE 321 (1931).

¹¹³ *Cf. Culombe v. Connecticut*, 367 U.S. 568, 641 (1961) (Brennan, J., concurring).

¹¹⁴ See Lewis, *Historic Change in the Supreme Court*, N.Y. Times, June 17, 1962, § 6 (Magazine), p. 7.

¹¹⁵ See *e.g.*, *Culombe v. Connecticut*, 367 U.S. 568 (1961); *Spano v. New York*, 360 U.S. 315 (1959); *Fikes v. Alabama*, 352 U.S. 191 (1957).

¹¹⁶ 297 U.S. 278 (1936).

Seven years ago—and Supreme Court decisions since that time have rendered many more confessions vulnerable—the problem loomed so large that:

In one large Midwestern city the case “checklist” of the public defender contained space for one of two entries under confessions—“voluntary,” or “involuntary.” The public defender who had constructed the “checklist” asserted that this issue was a complicating factor in almost every defense, for if the confession or statement by the defendant is to be attacked it places a heavy burden on counsel. Moreover, if a form of physical persuasion has been used to induce a confession, physical evidence in support of the defendant’s claim will often have vanished by the time of arraignment, when, in many cases, counsel appears for the first time. Even a brief survey of the law-enforcement methods used in the various states reveals frequent recourse to illegal methods in the treatment of suspects. It is equally clear that these practices are less frequently followed when counsel appears promptly.¹¹⁷

What would you say about the plight of the defendant whose lawyer never appears? What do the “historic changes” in the confession field mean to him? That they mean a great deal to defendants less worth saving, I have little doubt:

[T]he professional criminals, the “syndicate representatives,” the hired gunmen, and the veteran safe-crackers, are well aware of their rights and will say nothing until they see their lawyers. In fact, it is not uncommon in some cities for a “mouthpiece” to appear at precinct headquarters before the suspect is brought in. The undefended criminals, for the most part, are perpetrators of amateur crime, simple assault, petty larceny, or grand larceny involving slightly more than the statutory sum, or they are first or youthful offenders.¹¹⁸

¹¹⁷ BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 210–11 (1955).

¹¹⁸ *Id.* at 207. Professor Wayne LaFave of the University of Illinois College of Law, who is presently preparing material on “the right to counsel at the police station” in connection with the pilot studies of the American Bar Foundation in the course of its Survey of the Administration of Criminal Justice in the United States, informs me that: “In the observed jurisdictions the police did not have to fear a writ whenever the suspect was not allowed to contact counsel, except in the case of the professional criminal whose disappearance would lead his cohorts to conclude he had been arrested.” Letter, July 19, 1962. He notes that “when a ‘bagman,’ or numbers carrier, failed to appear at his regular stops, the syndicate would take steps to obtain a writ of habeas corpus. Writs sometimes reached the station before the arrestee, and sometimes were received on persons who had not even been arrested.” *Ibid.*

However, Professor Edward Barrett, Jr., of the University of California Law School and Reporter, Advisory Committee on Criminal Rules of the Judicial Conference of the United States, who has made intensive studies of police practices generally, see Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 CALIF. L. REV. 11 (1962) (although his two-city study does not touch on the instant problem) points out that: “Where the suspect is a member of an organized conspiracy which has regularly retained counsel . . . the process is apt to be at its most adversary. The lawyer will arrange bail promptly upon arrest. Neither the police nor the prosecutor will trust the lawyer (he will have to get a court order to get the time of day). . . . I am not at all sure that the difference here neces-

II: Come now, these instances of police misconduct are likely to come out at the trial.

Δ: Why? The prosecution is not going to bring them out. And the accused may not even see the problem, let alone know "the law" and have "the facts" to resolve it satisfactorily. He may think the confession is valid because he was not subjected to any physical violence. The first confession may not have been introduced and the defendant may not realize that even a second or third confession is inadmissible if tainted by the coercive measures that evoked the first.¹¹⁹ Or the police may have told him that they possessed a warrant, when they didn't.¹²⁰ Or the defendant may believe he never was "arrested," because the police told him: "This isn't an arrest; we just want to talk to you—now."¹²¹

Of course, most of the time there isn't any trial. Need I remind you that an estimated seventy-five to ninety per cent of criminal cases are decided by pleas of guilty?¹²² Of what avail are leading confession cases when the defendant

sarily works to the advantage of the suspect. If his lawyer gets him off, maybe so. But if he loses, the strong tendency will be to give him the maximum penalty." Letter to this writer, Aug. 6, 1962.

¹¹⁹ See Kamisar, *supra* note 108, at 98-101.

¹²⁰ See *e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 644-45 (1961).

¹²¹ See, *e.g.*, *People v. Zavaleta*, 182 Cal. App. 2d 422, 424, 6 Cal. Rep. 166, 167 (1960) (held—wrongly, it is submitted—not to constitute "custody" or "arrest").

¹²² See A. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1163 n.37, 1189 (1960). Since Professor Goldstein's article appeared, figures have been released on the disposition of felony defendants in California Superior Court for the five year period from 1956 through 1960. Of those cases decided (7.3% were dismissed or taken off the calendar), 70.1% were resolved by pleas of guilty; of those cases which resulted in convictions, 75.6% were obtained by pleas of guilty. CALIF. DEPT. OF JUSTICE, BUREAU OF CRIMINAL STATISTICS, CRIME IN CALIFORNIA 99 (Table VI-8) (1960). These figures take on enhanced significance when one considers that not only does California provide for assigned counsel as of right in all felony cases, but, with one exception (Santa Barbara), it has legal aid offices in every metropolitan area over 100,000. E. BROWNELL, LEGAL AID IN THE UNITED STATES 42, 68 (Supp. 1961). The Los Angeles Public Defender Office has a complement of seventy-one persons, including nine investigators. See Cuff, *Public Defender System: The Los Angeles Story*, 45 MINN. L. REV. 715, 729 n.35 (1961). This office, the City of Los Angeles Public Defender Office and the Long Beach City Public Defender Office serve a population of 6½ million. *Id.* at 727.

It has been pointed out that "our system for the trial of criminal cases would be burdened to the verge of collapse if the percentage of guilty pleas were substantially reduced." Barrett, *supra* note 118, at 45. The California experience amply demonstrates that extending the right to counsel so as to enable the defendant to make an informed, intelligent decision whether to plead guilty poses no real threat to "the system."

Of course, what impact the extension of the right to counsel will have on "the system" will vary, depending on such factors as the ability and character of the bar, the public defender's staff and the prosecutor's staff. Consider the observations of Professor Barrett (see note 118 *supra*), letter to this writer, Aug. 6, 1962. "[I]n this city [name withheld] the public defender and most defense counsel along with the prosecutor have a relationship which is far less adversary than in many other places. The role of the defense lawyer has in the bulk of cases come to be that of negotiating an appropriate settlement. With respect

"voluntarily" pleads guilty because he thinks he is bound by his previous coerced confession?¹²³ What comfort do landmark search-and-seizure cases furnish when, confronted with incriminating "real" evidence the defendant pleads guilty because he assumes the state can introduce the illegally seized evidence against him?¹²⁴ How potent is the deterrent force of the search-and-seizure and confession cases when the victim of police misconduct "pleads guilty and disappears from human view"?¹²⁵

II: There is always coram nobis or habeas corpus.

Δ: If he couldn't see the problem before, what are the odds that he'll see it later? If he couldn't afford to hire a lawyer to keep him out of prison, how likely is it that he will find the necessary funds after he goes to prison?

II: How do you account for the fact that the courts are being swamped with habeas corpus petitions?

Δ: You mean those pieces of paper written by semi-literate men? Or the papers prepared with the advice of "jailhouse lawyers," who, for a carton of cigarettes, will file anything, anywhere?¹²⁶ Are these "lawyers" the appropriate guardians of the Constitution and the Great Writ?¹²⁷ Does it come down to this?

Moreover, and more fundamentally, I am not at all sure that even Edward Bennett Williams can do anything for the man who pleaded guilty under the misapprehension that illegally obtained confessions or "real" evidence could be used against him. That is to say, I doubt that a plea of guilty is open to collateral attack on these grounds.

II: Hold on. What about *Herman v. Claudy*?¹²⁸ There, Mr. Justice Black said for the Court:

It is true that the trial record shows that petitioner told the judge that he was guilty and said "I throw myself at the mercy of the court, Your

to most defense lawyers, neither the police nor the prosecutor are afraid that by discussing the evidence and the problems they will be taking a risk that the lawyer will take unfair advantage of the situation. This situation is at least partly the result of the combination of a competent police force supervised by a prosecutor who is tough on screening out doubtful cases. As one private defense lawyer put it, '95% of the people who consult me are guilty in the sense that they did the act charged though they may not be guilty of the particular crime, or degrees thereof, which is charged.' This lawyer added that in ten years (the same ten years in which the police force was dramatically overhauled and improved) he went from trying 70% of his cases to trying 20% or less."

¹²³ "[T]he extorted confession is often the white flag of surrender, followed by a plea of guilty." MCCORMICK, EVIDENCE 233 (1954).

¹²⁴ See Kamisar, *supra* note 108, at 83 & n.22.

¹²⁵ Howard, *Foreword to GOLDMAN, THE PUBLIC DEFENDER* at iv (1917).

¹²⁶ See McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5, 21 n.31 (1949).

¹²⁷ Cf. STIMSON & BUNDY, ON ACTIVE SERVICE IN PEACE AND WAR xxi-xxii (1947).

¹²⁸ *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116 (1956).

Honor.” But neither these nor any other statements made before the trial judge at that time are in themselves sufficient to refute as frivolous or false the serious charges made by the petitioner concerning matters not shown by the record. See *Palmer v. Ashe*. . . . It is entirely possible that petitioner’s prior confession caused him, in the absence of counsel, to enter the guilty plea.¹²⁹

Δ: So you read *Herman* for all it is worth? I wish I could. But consider the facts. What were the “serious charges” made by petitioner?

As a result of incommunicado detention and the threats and abuse, defendant finally “confessed” to a series of offenses, signing a form entitled Waiver of Grand Jury and Entry of Plea by which he agreed to plead guilty to three indictment charges. . . . Brought before the court for sentence . . . petitioner was directed by the Assistant District Attorney to sign pleas to 8 indictments; when he inquired as to what he was signing, he was told by the District Attorney, “Sign your name and forget it.” There were 27 different charges in the indictments against petitioner. . . . Petitioner at the time of the entry of his guilty plea was 21 years of age. His only education was 6 years of elementary school. . . . Nor was petitioner informed by anyone that . . . he was pleading guilty to indictments that carry a maximum sentence of 315 years. He did not even learn until [3 months later] when he wrote to the trial judge . . . specifically what offenses he had pleaded guilty to.¹³⁰

The case can surely be read narrowly to mean no more than that under the circumstances, although *Herman*’s plea may have been “voluntarily” made, it certainly was not “understandingly” made. According to the allegations, for

¹²⁹ *Id.* at 121–22. Petitioner contended in *Cicenia v. Lagay*, 357 U.S. 504 (1958), that, as the Court described it, his confession was “vitiated by police refusal to permit him to confer with counsel during his detention . . . and that because his plea of *non vult* was based on the confession, the conviction must fall as well.” *Id.* at 508. Since the confession was found valid, “we need not consider the State’s further contention that petitioner was not denied due process because the confession was never ‘used’ against him, he having pleaded *non vult* to the indictment. But cf. *Herman v. Claudy*. . . .” *Id.* at 508 n.3.

The *Cicenia* district court did consider this point and indicated for interesting and narrow reasons, that if the confession had been coerced the court would have found the plea of *non vult* “based” on it: Such a plea insures the defendant’s life; standing trial to contest the legality of the confession could result in the death sentence. “This puts a harsh burden of choice on a defendant in such a situation that is not present in other than capital causes since it is only in the latter that New Jersey permits the imposition of a harsher penalty after jury verdict than it does upon plea of *non vult*. It is much easier to find a waiver of rights under a claim of illegal procurement of a confession in a non-capital case where the law punishes with equal severity every convicted person whether that conviction is by verdict after trial or follows the accused’s admission in open court. . . . [W]hen an accused voluntarily pleads guilty or *non vult* there is very little ground left upon which to postulate a factual finding that the plea was ‘based’ on the confession if the law affords no extraordinary encouragement to make the plea rather than to stand trial on the merits. But in capital cases in New Jersey there is an extraordinary encouragement. . . .” Application of *Cicenia*, 148 F. Supp. 98, 101–02 (D.N.J. 1956).

¹³⁰ Brief for Petitioner, pp. 3–5.

all Herman knew he was entering a plea to three charges pursuant to his earlier (allegedly coerced) agreement. This view finds support in the reference to *Palmer v. Ashe*,¹³¹ which dealt with the allegation that petitioner was deceived into pleading guilty to armed robbery because led to believe the charge was only breaking and entering.

To say that a "voluntary" plea is vitiated when defendant misunderstands its nature and consequences—or even to say that a defendant meeting Herman's "special circumstances" (youth, limited schooling, grave and complex charges) can not enter a valid plea without the guiding hand of counsel—is a far cry from the proposition that when an uncounselled defendant pleads guilty, the plea is invalid whenever he is unaware that the evidence confronting him would be inadmissible at the trial.

The Court cited no authority against such derivative use of a prior coerced confession to obtain a plea of guilty. Nor did petitioner. As for the state, it never even considered the point.

The *Herman* case makes no attempt to distinguish *Townsend v. Burke*,¹³² where Mr. Justice Jackson observed for the majority:

In this present case no confession was used because the plea of guilty in open court [without the aid of, or advice of his right to, counsel] dispensed with proof of the crime. Hence, lawfulness of the detention is not a factor in determining admissibility of any confession and if he were temporarily detained illegally, it would have no bearing on the validity of his present confinement based on his plea of guilty, particularly since he makes no allegation that it [the illegal detention] induced the plea.

Petitioner also relies on *Haley v. Ohio*, 332 U.S. 596, in which this Court reversed a state court murder conviction because it was believed to have been based on a confession wrung from an uncounseled 15-year-old boy held incommunicado during questioning by relays of police for several hours late at night. Even aside from the differing facts, that case provides no precedent for relief to this prisoner since, as has been said, no confession was used against him, and he does not allege that his pleas of guilty resulted from his allegedly illegal detention.¹³³

II: Well, at another place in the *Herman* opinion, Justice Black cited six cases for the proposition that "a conviction following trial or on a plea of guilty based on a [coerced] confession . . . is invalid under the Federal Due Process Clause."¹³⁴

Δ: Yes, but none of the cases listed involved pleas of guilty. The latest and most relevant authority listed is Black's own opinion for the majority in *Leyra v. Denno*, excluding subsequent confessions because they were so closely related to the coerced first confession that "the facts of one control the

¹³¹ 342 U.S. 134 (1951).

¹³³ *Id.* at 738.

¹³² 334 U.S. 736 (1948).

¹³⁴ 350 U.S. at 118.

character of the other.’”¹³⁵ This is the well-settled test for admitting a “second” or “consecutive” confession. The controlling question in these cases is whether the second confession is free from the coercive influences which rendered the first “involuntary,” not whether the second was derived from or was the outgrowth of the first.¹³⁶

Thus, Black’s use of the *Leyra* case in *Herman* can be squared quite nicely with *Townsend v. Burke*. All Black seems to have said is that if the coercive pressures which invalidated the first confession still linger at the time a plea of guilty or an agreement to plead is made, then the plea is “based on” a coerced confession and must fall.¹³⁷ On the other hand, so long as an otherwise free and voluntary extrajudicial confession is valid, even if induced by a prior inadmissible one (*i.e.*, even if defendant erroneously believes the first confession can be used against him), it is difficult to see why an otherwise free and voluntary plea in open court is not operative under similar conditions.

II: It is surprising that the courts have not excluded “second confessions” or pleas induced by coerced first confessions as the “fruit of the poisonous tree.”

Δ: Distressing, yes; surprising, no. After all, the first rules governing the admissibility of confessions were laid down at a time when illegal police methods were relevant only insofar as they affected the trustworthiness of the evidence.¹³⁸ Although a new dimension has been added—a major purpose is now to protect the accused against (and discourage the police from using) certain interrogation practices, regardless of the truth or falsity of the confession so produced in a particular case¹³⁹—the “consecutive confession” cases still reflect the common law origins of the due process confession rule.

What is surprising is that neither guilty pleas¹⁴⁰ nor, generally, incriminating statements¹⁴¹ induced by confrontation with illegally seized “real” evi-

¹³⁵ 347 U.S. 556, 561 (1954).

¹³⁶ See Kamisar, *supra* note 108, at 98–101 and authorities collected therein.

¹³⁷ Petitioner Herman so utilized—and only utilized—the *Leyra* case for this proposition. Brief for Petitioner, p. 7.

¹³⁸ See 1 GREENLEAF, EVIDENCE § 254a (16th ed. Wigmore 1899), quoted with approval in *Adams v. New York*, 192 U.S. 585, 595 (1904); 3 WIGMORE, EVIDENCE §§ 822, 823(b)(3d ed. 1940), 8 *id.* at §§ 2183, 2184.

¹³⁹ See note 6 *supra* and accompanying text.

¹⁴⁰ *E.g.*, *United States v. Zavada*, 291 F.2d 189 (6th Cir. 1961); *Thomas v. United States*, 290 F.2d 696 (9th Cir. 1961), *cert. denied*, 368 U.S. 964 (1962); *Alexander v. United States*, 290 F.2d 252 (5th Cir. 1961), *cert. denied*, 368 U.S. 891 (1961); *United States v. Salzano*, 241 F.2d 849 (2d Cir. 1957); *United States v. Sturm*, 180 F.2d 413 (7th Cir. 1950) (alleged coerced confession and illegal search and seizure); *cf.* *United States v. French*, 274 F.2d 297 (7th Cir. 1960) (alleged *McNabb-Mallory* rule violation); *United States ex rel. Trowbridge v. Pennsylvania*, 112 F. Supp 356 (W.D. Pa. 1952), *aff’d per curiam*, 204 F.2d 689 (3d Cir. 1953) (alleged coerced confession). *Contra*: *United States v. Walsh*, 89 F. Supp. 409 (D. La. 1949) (no discussion or citation or authorities).

¹⁴¹ See cases collected in Kamisar, *supra* note 108, at 83 n.22.

dence are excluded as the outgrowth or the product of police illegality. Somehow, unlike their more tangible counterparts, something about the fruits being verbal or testimonial, rather than tangible, makes them more edible.

II: Why, only this year the New York Court of Appeals ruled that the exclusionary rule in search-and-seizure cases extends to all fruits, "oral" as well as "real" evidence.¹⁴²

Δ: Yes. This purported to be a more or less routine application of *Mapp*. Yet the Supreme Court has never excluded such fruits and prior to the recent New York ruling every state that considered the question had resolved it the other way.¹⁴³

The New York decision may be a landmark in its own right. At the very least, it should alert every lawyer to this derivative use issue, especially in those jurisdictions that have not yet passed on the matter. (Whether the untrained, uncounselled laymen have also been alerted, I leave to you.)

Of course, the New York Code of Criminal Procedure requires that at the time of arraignment a defendant must be advised of his right to court-assigned counsel if he is without the funds to hire one.¹⁴⁴ If these requirements are met, however, there is no indication that New York will depart from the prevailing view in another respect and exclude illegal search-and-seizure induced guilty pleas.¹⁴⁵ Only this July the New York Court of Appeals handed down two decisions that seem to foreclose coerced confession-induced guilty pleas from collateral attack on what amounts to jurisdictional grounds.¹⁴⁶

If anything, there is more to be said for subjecting such a plea to collateral attack than one induced by an illegal search or seizure. After all, a "voluntary" plea preceded by a coerced confession is not necessarily a reliable plea. If the defendant is under the misapprehension that the prior confession is admissible against him, he may adhere to it even though he knows it is false, since he believes that he "can't win" anyhow and that he might well receive a lighter sentence by not putting the state to the trouble of a trial.

Suffice it to say that despite the "poisonous tree" doctrine in the search-and-seizure cases and the language in the *Herman* opinion to the contrary notwithstanding, there is much recent lower court authority to the effect that a

¹⁴² *People v. Rodriguez*, 11 N.Y.2d 279, 183 N.E.2d 651, 229 N.Y.S.2d 353 (1962).

¹⁴³ See note 141 *supra*.

¹⁴⁴ N.Y. CODE CRIM. P. § 308.

¹⁴⁵ Consider the dictum in *People v. Eastman*, 33 Misc. 2d 583, 593, 228 N.Y.S.2d 156, 167 (Sup. Ct. 1962) (denying coram nobis relief where unconstitutionally seized evidence admitted at 1956 trial): "[I]t is clear that failure to raise an issue of unreasonable search and seizure (or other issue of constitutional dimension) by electing to plead to the crime or by failing to appeal . . . forecloses resort to collateral attack upon the judgment of conviction."

¹⁴⁶ *People v. Nicholson*, 11 N.Y.2d 1067, 184 N.E.2d 190, 230 N.Y.S.2d 220 (1962); *People v. Fish*, 11 N.Y.2d 1069, 184 N.E.2d 191, 230 N.Y.S.2d 222 (1962) (mem., decided upon authority of *Nicholson*), *affirming* 15 App. Div. 2d 536, 222 N.Y.S.2d 1017 (1961), *affirming per curiam* 23 Misc. 2d 842, 206 N.Y.S.2d 828 (Sup. Ct. 1960).

"voluntary" plea of guilty forecloses the defendant's right to object to the manner in which evidence was obtained—whether it be an invalid confession or a wrongful search—as well as to the sufficiency of the evidence.¹⁴⁷

II: All those cases can readily be distinguished on the ground that defendant had the aid of counsel at the time of plea. I think it is agreed that such a defendant should not be able to plead on the hope or expectation of receiving a relatively light sentence and then turn around and withdraw the plea when the sentencing judge does not accommodate him. Surely, he cannot indulge in a plea as a mere test balloon.

Δ: Yes, those cases ought to be distinguished this way, but will they be? There is much sweeping language in them transcending the presence or absence of counsel at arraignment: The plea "constitutes a waiver of all non-jurisdictional defenses";¹⁴⁸ a plea having been made, the error is "removed from our consideration";¹⁴⁹ there is no "causal connection" between the alleged violation of defendant's rights and his conviction.¹⁵⁰

II: Look, before a plea forecloses anything it must have been both voluntarily and understandingly made. If defendant is without the aid of counsel and unaware that certain defenses are available to him, then—like the *Herman* and *Palmer* cases—his plea is not "understandingly" made. Isn't it that simple?

Δ: I am afraid not. Consider *Edwards v. United States*.¹⁵¹ Petitioner contended that he had been deprived of the effective assistance of counsel because he had been advised to plead guilty despite the fact (as he later learned) that much, if not all, of the government's case was based on (1) illegally seized evidence and (2) confessions elicited in violation of the *McNabb-Mallory* rule, and quite possibly fifth amendment due process as well. In sustaining a denial of his motion to vacate the conviction, the Court of Appeals for the District of Columbia observed:

Certainly ineffective assistance of counsel is . . . immaterial in an attempt to impeach a plea of guilty, except perhaps to the extent that it bears on the issues of voluntariness and understanding.

. . . It may be argued that a plea of guilty is not understandingly made when defendant is unaware of certain technical defenses which might very well make the prosecutor's job more difficult or even impossible were he put to his proof. However we think "understandingly" refers merely to the *meaning* of the charge, and what acts amount to being *guilty* of the charge,

¹⁴⁷ See note 140 *supra*.

¹⁴⁸ *Thomas v. United States*, 290 F.2d 696, 697 (9th Cir. 1961), *cert. denied*, 368 U.S. 964 (1962).

¹⁴⁹ *Alexander v. United States*, 290 F.2d 252, 254 (5th Cir. 1961), *cert. denied*, 368 U.S. 891 (1961).

¹⁵⁰ *United States v. Sturm*, 180 F.2d 413 (7th Cir. 1950).

¹⁵¹ 256 F.2d 707 (D.C. Cir. 1958).

and the *consequences* of pleading guilty thereto, rather than to dilatory or evidentiary defenses. . . . Appellant does not try to say he did not do the act charged. He pleads only that, unknown to him, he *might* have been able to suppress the truth as to certain evidence of his crime, and thus, perhaps defeat justice. He cannot be heard to this end after a voluntary, knowing plea of guilty.¹⁵²

Even where a defendant had pleaded guilty shortly before *Mapp* and sought to withdraw the plea immediately after that landmark case was handed down, he has not been allowed to do so.¹⁵³ The courts, it seems, are determined to protect defendant's "right" to enter a plea, even though the state does not possess sufficient lawfully obtained evidence to convict him.¹⁵⁴ True, in that case defendant had counsel when he entered his plea, but since *Mapp* had not yet been decided counsel paid no attention to the search-and-seizure point, relying on "contemporaneous decisions of the Supreme Court unambiguously indicating the constitutional issue to be frivolous and unsubstantial."¹⁵⁵ How the plea can be said to have been "understandingly" made then, in the sense you use the term, is difficult to see.

II: I must confess I can readily understand why a court will not permit a defendant to withdraw a plea—whether or not it was given on the advice of counsel—when he later discovers that trustworthy, incriminating evidence is inadmissible. The sentencing of an innocent person upon a plea is one thing, but damn it, these fellows are guilty.¹⁵⁶

Δ: Look here, my friend, I came to honor *Mapp*, not to bury it.

So long as a police officer knows that if he "guesses" right the inadmissible evidence can be used to induce a valid plea of guilty he will be "encouraged to proceed in an irregular manner on the chance that all will end well."¹⁵⁷ The whole point of the exclusionary rule is to remove the incentive to engage in objectionable practices, but the prospects of a plea "making good" a search illegal at its inception furnishes just such an incentive.¹⁵⁸ Of course, the same thing can be said for improper interrogation methods. Here, too, if an inadmissible confession-induced plea is valid, there is good reason to disregard the teachings of appellate decisions.

¹⁵² *Id.* at 709–10.

¹⁵³ *People v. Weisman*, 229 N.Y.S.2d 171 (Westchester County Ct. 1962); *People v. Bertrand*, 28 Misc. 2d 1084, 216 N.Y.S.2d 790 (Ct. Gen. Sess. 1961).

¹⁵⁴ See *People v. Bertrand*, 28 Misc. 2d 1084, 1085, 216 N.Y.S.2d 790, 792 (Ct. Gen. Sess. 1961).

¹⁵⁵ Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 45.

¹⁵⁶ This point is emphatically made in *Bartozek v. State*, 186 Wis. 644, 647, 203 N.W. 374, 375 (1925), quoted with approval in *People v. Bertrand*, 28 Misc. 2d 1084, 1085, 216 N.Y.S.2d 790, 792 (Ct. Gen. Sess. 1961).

¹⁵⁷ *Nueslein v. District of Columbia*, 115 F.2d 690, 694 (D.C. Cir. 1940) (Vinson, J.).

¹⁵⁸ *Ibid.*

II: All right, such pleas ought to be vulnerable to collateral attack and if constitutional law is a "prediction" of what the Supreme Court will do,¹⁵⁹ I'll go further and say they are.¹⁶⁰

Δ: I hope you're right. Let's assume you are. The victim of such a guilty plea still must clear some formidable hurdles.

II: What now?

Δ: First of all there is the problem of access to the courts. The large number of federal-question habeas corpus cases that poured out of Illinois after the disclosure that petitions "were being bottled up by a system of prison censorship"¹⁶¹ suggests that objectionable prison practices may account for the fact that none, or only one or two petitions per year, are being filed in other states.¹⁶²

It must be said that the courts "have shown an illiberal attitude in defining the right of access."¹⁶³ For example, when a prisoner alleged that he was denied the right to transmit a petition because he failed to enclose the requisite number of copies to various state offices, the court backed away, labelling the action complained of a matter of "internal management."¹⁶⁴ Even where a denial of access is established, petitioner may be denied relief on the grounds that he chose an improper remedy or forum.¹⁶⁵ It almost goes without saying that the courts have taken a similar general "hands off" attitude toward alleged denials of access to such luxurious items as legal materials.¹⁶⁶

When a state prisoner is permitted to explore the "dimly lit" habeas corpus jurisdiction,¹⁶⁷ what then? He is likely to discover that "state and federal judges of long experience have expressed open incredulity toward the most elementary aspects of federal habeas corpus."¹⁶⁸ He is likely to experience firsthand the "outright hostility toward development of postconviction

¹⁵⁹ Cf. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167-76 (1920); and the penetrating comments on Holmes' "bad man" abstraction in FULLER, *THE LAW IN QUEST OF ITSELF* 92-95 (1940).

¹⁶⁰ Does the "But cf. *Herman v. Claudy*" in the *Cicenia* case (see note 129 *supra*) warrant this prediction? If such guilty pleas are to be vitiated, what of the well-settled test for admitting a "second" or "consecutive" confession (admissible so long as coercive influences which invalidated the first are dissipated) or the prevailing view that incriminating statements induced by confrontation with the fruits of unreasonable searches are admissible? How can these rules survive? If they can, what result when a coerced confession induces a second "voluntary" confession and the second confession causes the defendant to plead guilty? Or when confrontation with illegally seized evidence evokes incriminating statements and the existence of such statements induces a plea?

¹⁶¹ Schaefer 21.

¹⁶² *Id.* at 22.

¹⁶³ Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985, 989 (1962).

¹⁶⁴ *Ibid.*

¹⁶⁵ *Id.* at 989-90.

¹⁶⁶ *Id.* at 992-95.

¹⁶⁷ Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960) [hereafter cited as Reitz].

¹⁶⁸ *Id.* at 462.

remedies"¹⁶⁹ illustrated so well by the proud boast of Chief Justice Weygant, at the time Chairman of the Conference of Chief Justices, no less, that "we at least have a consistent record in Ohio that we have never allowed one of these writs of habeas corpus."¹⁷⁰

II: My friend, you *are* a bleeding heart.

Δ: I am merely trying to sketch some of the grim realities of habeas corpus litigation. Perhaps the most graphic way to do so is to point to the recent case of *Parker v. Ellis*.¹⁷¹ Every Justice on the Court seemed to agree that Parker had been convicted of a felony in disregard of his constitutional right to counsel,¹⁷² but when his case came to be heard in the Supreme Court, he had already served his sentence. Thus, although "there has hardly been a minute in the past five years that Parker's case has not been before a court,"¹⁷³ his "five-year quest for justice" ended "ignominiously in the limbo of mootness."¹⁷⁴ The fact that an attorney was not appointed to represent Parker's interests until certiorari was granted, some four and a half years after his conviction,¹⁷⁵ points up another practical difficulty: that petitioner alleges he was prejudiced by the lack of counsel in the first place entitles him to no counsel in the second or third place. As the dissent sadly notes, "left to his own devices," Parker's first petition to the Supreme Court, years earlier, "did not sufficiently reveal the prejudice which he suffered at the trial."¹⁷⁶

That the *Parker* case is not atypical can be seen from a recent careful study of thirty-five cases (drawn from the reported opinions of the federal courts over a ten-year period) in which a state prisoner successfully attacked the judgment under which he was confined:

A most striking fact discovered from the 35 cases studied is the dominance of the issue of right to counsel as the contention most likely to succeed in federal habeas corpus. In roughly half of the cases, the state judgment fell on this ground. As only four of these cases involved a capital offense, the largest stumbling block in the administration of state criminal law is revealed as the non-absolute right to counsel for indigents in noncapital cases

A second extraordinarily significant element revealed in these 35 cases is the extremely serious crimes for which the successful petitioners had been convicted There were altogether 17 capital cases. In nine, the sentence imposed was death. Fifteen of the successful petitioners were serving sentences of life imprisonment. In the 11 remaining cases, the penalties were heavy: the mean maximum sentence was 24.8 years; the median, 25 years.

¹⁶⁹ *Id.* at 472.

¹⁷⁰ *Hearings on H.R. 5649 Before Subcommittee No. 3 of the House Comm. on the Judiciary*, 84th Cong. 1st Sess., ser. 6, at 12 (1955).

¹⁷¹ 362 U.S. 574 (1960).

¹⁷² *Id.* at 577 (this, and all references *infra*, are to the Chief Justice's dissenting opinion).

¹⁷³ *Id.* at 581.

¹⁷⁵ *Id.* at 581.

¹⁷⁴ *Id.* at 577.

¹⁷⁶ *Id.* at 581 n.6.

The most likely explanation for the absence of lesser convictions from the group is the time factor. There is no reason to believe that constitutional guarantees are more rigorously followed in prosecution of minor crimes. . . . But evidently it takes so long to mature a case for federal habeas corpus that the lighter sentences are completed before reaching that stage. This is borne out by the time lapse between conviction and the obtaining of relief in the group of successful cases There were 13 cases in which the time span was 10 years or more, 24 in which it was five years or more.¹⁷⁷

Moreover, we do not know how many prisoners, particularly those nearing the end of their sentences, fail to seek or to pursue remedies in the belief that to do so might jeopardize their chances for parole.¹⁷⁸

I say, again, assuming that a prisoner can attack his guilty plea on the ground that it was induced by an "involuntary confession" or illegally seized evidence, how far does that get us? How many are likely to prevail on this theory? Whatever may be said for sensitivity to acquittal or reversal on appeal, the high probabilities are that no police officer either knows or cares what happens to a prisoner three or four or five years after he is sentenced.¹⁷⁹ Are the few habeas corpus releases years later likely to influence police practice one whit? Here, as elsewhere, I'm afraid the Great Writ just doesn't come close to being a substitute for court-assigned counsel in the first instance.

I can do better than that. I can show you why you and I are really on the same side of this question. If federal habeas corpus were to emerge as any sort of potent means for challenging the induced guilty pleas we've been talking about—why, I shudder to think of the uproar you and others would raise.

II: I'm always suspicious of fellows who want to do me a favor.

Δ: The practical difficulties of litigating years later the factual background behind a "voluntary" guilty plea are staggering. Even if it might appear that the confession were "involuntary" or the seizure illegal, there is always the possibility that the state could have justified the police conduct, but regarded it as unnecessary to do so. Even if the methods used to seize the evidence or elicit confession were out of bounds, the defendant may have pleaded guilty because of other damning evidence—now lost—or the availability of prosecution witnesses, whose whereabouts are now unknown.

Finally, "consider the opportunities for collateral attack that would open up whenever the Supreme Court extended the scope of the exclusionary rule."¹⁸⁰ For example, consider its recent liberalization of the rules on stand-

¹⁷⁷ Reitz 483-85.

¹⁷⁸ *Id.* at 513 n.306.

¹⁷⁹ "The average police officer is under terrific administrative pressure to clear known offenses by arrest and conviction. . . . [A]rrest and conviction have long since come to be considered the primary police objectives in handling offenders, and no systematic effort has been made to correlate successful police work with the type and length of sentence imposed, or even to keep information concerning sentences." Ohlin & Remington, *Sentencing Structure: Its Effect upon Systems for the Administration of Criminal Justice*, 23 LAW & CONTEMP. PROB. 495, 500 (1958).

¹⁸⁰ Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 3

ing to challenge illegally seized evidence.¹⁸¹ "There might well be a quarrel between the Constitution and common sense if each such change served to invite fresh attacks on final judgments."¹⁸²

True, the above remarks were addressed to the question of whether or not *Mapp* should be applied retroactively. But consider the case of an uncounseled defendant, who now pleads guilty, with *Mapp* and recent confession cases on the books. Or for that matter an unrepresented defendant who now stands trial but who fails to see the confession or search-and-seizure problem or, if he does, fails to raise the defense properly. If he can invoke yet unborn decisions modifying the current cases to upset his conviction by a collateral attack—and it certainly appears as if he can¹⁸³—what then? Won't we be forever applying new decisions retroactively in habeas corpus proceedings?

Therefore, isn't it to the advantage of the prosecution as well as the defense to provide the indigent with a lawyer? By so doing—by overruling *Betts v. Brady*—not only do we head off new federal-state friction along the lines I have just suggested, not only do we prevent further interference with the administration of state criminal law, but we eliminate the "largest stumbling block in the administration of state criminal law"¹⁸⁴ presently existing. The

¹⁸¹ *Jones v. United States*, 362 U.S. 257 (1960).

¹⁸² Traynor, *supra* note 180, at 341.

¹⁸³ A good example is *Reck v. Pate*, 367 U.S. 433 (1961), ordering petitioner's release twenty-five years after he was sentenced to 199 years for murder. In denying habeas corpus relief, the district court observed that "Reck was convicted . . . in 1936 [the year the first due process confession case was handed down by the Supreme Court] and at that time the due process clause was not violated by the circumstances surrounding the making of his confession." 172 F. Supp. 734, 745 (N.D. Ill. 1959). The district court pointed out that *Brown v. Mississippi*, 297 U.S. 278 (1936), and even *Chambers v. Florida*, 309 U.S. 227 (1940) "can be interpreted in light of the classical test of untrustworthiness," *id.* at 740; [and rest on "coercion proved in fact," *id.* at 743]; due process violations were not based on whether conditions "surrounding the making of the confession, were 'inherently coercive' "—petitioner's situation—until years later. *Id.* at 740. In reversing, the Supreme Court did not discuss the "retroactivity" point. Agreeing that "this case lacks the physical brutality present in *Brown v. Mississippi*," 367 U.S. at 442, the Court went on to find, *id.* at 443, that "the record here . . . presents a totality of coercive circumstances far more aggravated than those which dictated our decision in *Turner*." [*Turner v. Pennsylvania*, 338 U.S. 62 (1948)].

¹⁸⁴ Reitz 483. It is interesting to note that courts in states which do not furnish counsel as of right to all indigent felony defendants have recognized the worth of an "ounce of prevention" in other contexts. Thus, in *Commonwealth v. Stepper*, 54 LACKAWANNA JURIST 205, 213 (Ct. of Oyer and Terminer of Lackawanna County Pa. 1952), the first significant criminal discovery case in Pennsylvania, the trial court observed: "We would rather remove any obstacle to a fair trial, before the trial, rather than have it removed later and double the expense of difficult and protracted proceedings to the Commonwealth." And in *Sneed v. Mayo*, 66 So. 2d 865, 873 (Fla. 1953), it was pointed out that much collateral attack could be avoided "if the courts . . . would require full transcript or minute entries of what transpires in the course of a trial through every stage. . . . The cost of inconvenience to the judicial system of following the suggested procedure would be insignificant compared to the cost incident to the trial of an ever increasing number of habeas corpus proceedings involving the transportation of convicts, witnesses, prosecutors, and judges who, in effect, are put on trial in the habeas corpus court by the convict."

nonabsolute right to counsel for indigents gives rise to much of the illness; the flood of habeas corpus petitions only provides the symptoms.

To sum up, when and if it overrules *Betts v. Brady* and promulgates a new rule extending the absolute right to counsel to all felony defendants, or even further, the Court will be

seeking and finding comfort in the conviction that the decision and the rule announced fit with the feel of the body of our law—that they go with the grain rather than across or against it, that they fit into the net force-field and relieve instead of tautening the tensions and stresses.¹⁸⁵

II. THE REQUISITE “INGREDIENT OF UNFAIRNESS”¹⁸⁶: HEREIN OF “MIGHT HAVE BEENS” AND “MUST HAVE BEENS”

II: You launched your attack on the *Betts* rule on the need to insure the reliability of the “guilt-determining process.” All I have heard since is a great deal of talk about the need to overrule *Betts* in order to effectuate and implement the recent gains made in the search-and-seizure and confession areas. But these developments have little bearing on the guilt-determining process. Obviously, *Mapp* denies the triers of fact convincing and reliable evidence.

Δ: What about “involuntary” confessions?

II: What about them? Although talk about “voluntary” and “involuntary” confessions once were alternative statements of the rule that a confession was admissible so long as it was free of influence that made it “unreliable” or “probably untrue,”¹⁸⁷ it is quite clear that this is no longer so. One need only recall *Watts v. Indiana*¹⁸⁸ where the confession was thrown out even though it contained statements independently established as true.

Even a decade ago, before the recent flock of “psychological coercion” cases, Professor McCormick quite properly pointed out that the “rules of competency . . . the policy of safeguarding the trustworthiness of evidence”

¹⁸⁵ LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 191 (1960).

¹⁸⁶ “[I]n every case in which this doctrine was invoked and due process was found wanting, the prisoner sustained the burden of proving, or was prepared to prove but was denied opportunity, that for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement.” *Foster v. Illinois*, 332 U.S. 134, 137 (1947). See also *Townsend v. Burke*, 334 U.S. 736, 739 (1948) (“disadvantage from absence of counsel” must be “aggravated by circumstances showing that it resulted in the prisoner actually being taken advantage of, or prejudiced”); *Uveges v. Pennsylvania*, 335 U.S. 437, 441 (1948) (particular facts such as gravity and complexity of crime, age and education of defendant, and conduct of trial judge and prosecutor must “render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair”), quoted with approval in *Cash v. Culver*, 358 U.S. 633, 637 (1959) and *McNeal v. Culver*, 365 U.S. 109, 111 (1961). See also the discussion of recent state cases note 23 *supra*.

It is now clear that there is a “flat” or “absolute” requirement of counsel in capital cases, but it is not clear why. See note 23 *supra*.

¹⁸⁷ See 3 WIGMORE, *EVIDENCE* § 822 (3d ed. 1940) [hereinafter cited as WIGMORE] and cases discussed therein.

¹⁸⁸ 338 U.S. 49, 50 n.2 (1949).

were playing only a minor role in shaping the confession rules;¹⁸⁹ even then, the "predominant motive" was that of "protecting the citizens against the violation of his *privileges* of immunity from bodily manhandling of the police, and from . . . other undue pressures. . . ." ¹⁹⁰ True, "as law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated," ¹⁹¹ the Court has continued to outlaw confessions. But in doing so it has reduced the factor of "safeguarding the trustworthiness of the evidence" still further.

Take *Spano v. New York*.¹⁹² Officer Bruno may have destroyed a beautiful friendship by telling defendant Spano that the latter's phone call "had gotten him in a lot of trouble," that his job was in jeopardy, and that loss of his job would be disastrous to his wife and kids.¹⁹³ But what sane man would respond to such entreaties by confessing to a murder he didn't commit? If Spano were innocent, how could such modest pressures override the "insistent and ever-present forces of self-interest" and "self-protection"? ¹⁹⁴

Δ: What if you're right? All I have tried to demonstrate is that without the help of a lawyer not only may "all the other safeguards of a fair trial . . . be empty," ¹⁹⁵ but so may legal protections against police misconduct outside the courtroom. I felt no need to dwell on the first point. For to do so would be to provide a "rather bizarre spectacle" not unlike that presented by certain biologists, some fifty years ago, who "solemnly offered us as epoch-making discoveries their demonstrations that dogs get weaker and die if you give them no food" and "intense pain makes mice sweat." ¹⁹⁶

II: Have no fears, my friend. Here, as elsewhere, "we need education in the obvious." ¹⁹⁷

True, the point is obvious to those "with business addresses in academies, who ascribe eternal and absolute verity to anything alleged in a habeas corpus plea and credit correctness only to those decisions which turn prisoners loose." ¹⁹⁸ I am much more impressed with how these petitions have fared. Over the years, from 1 to 2 per cent of the petitions have been granted, and,

¹⁸⁹ McCORMICK, EVIDENCE 229 (1954) [hereinafter cited as McCORMICK].

¹⁹⁰ *Ibid.*

¹⁹¹ *Spano v. New York*, 360 U.S. 315, 321 (1959).

¹⁹² 360 U.S. 315 (1959).

¹⁹³ *Id.* at 319, 323.

¹⁹⁴ McCORMICK 226.

¹⁹⁵ Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. REV. 761, 773 (1961) (James Madison Lecture).

¹⁹⁶ George Bernard Shaw, quoted in Cahn, *Jurisprudence*, 1954 ANN. SURVEY AM. L. 809, 818.

¹⁹⁷ HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 292 (1920).

¹⁹⁸ Desmond, *Federal Habeas Corpus Review of State Court Convictions*, 50 GEO. L.J. 755, 757 (1962).

in turn, only a small fraction of this handful are actually discharged by federal courts.¹⁹⁹

Δ: I suspect this only serves to demonstrate that the difficulties of proof involved in reconstructing trials of the distant past are most formidable and that prisoners handling post-conviction litigation themselves are inept; not that all but 1 or 2 percent received full justice in the first place.²⁰⁰

Π: On the other hand, one can argue that "if even the federal courts themselves must admit that the state tribunals have been correct at least 98.6 percent of the time when their convictions have been challenged, it is not completely amiss to surmise that the state courts may have been right in those few cases where the writs were granted and the prisoners discharged."²⁰¹

All we can do is to take the figures as we find them. And when we do, we have every right to say of what we have: in the long run, well and good.

Δ: You remind me of something William James said somewhere: "Nature tells all frogs to jump for what looks red and take their chances. If it is only red meat, well and good; if it is red flannel on a hook, in the long run also well and good, though not for that particular frog."²⁰²

Π: Surely you realize we can never attain perfect justice.

Δ: That's no reason to stop trying to approach it. "The absence of counsel is in itself the most frequently found constitutional defect in state prosecutions."²⁰³ We can come significantly closer to perfect justice by furnishing a lawyer to all defendants, regardless of their financial ability. By not forgetting about the "particular frog" who gets hooked when he "takes his chances."

A. Another Look at the Addressees of the Court's Commands

Π: You're missing the whole point. No defendant simply "takes his chances." You're forgetting about the trial judge and prosecutor. Your distinction between police officers and other state officials cuts two ways. Sure judges and prosecutors will be the addressees of a new right-to-counsel rule, but in the meantime they are the addressees of the old *Betts* rule.

Mr. Justice Douglas and Company would have us believe that constitutional rights cannot be entrusted "to the discretion of those whose job is the detection of crime and the arrest of criminals," that "history shows . . . the

¹⁹⁹ See, e.g., FELLMAN, *THE DEFENDANT'S RIGHTS* 76-77 (1958); Baker, *Federal Judicial Control of State Criminal Justice*, 22 MO. L. REV. 109, 140 (1957); Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 53 (1956); Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 474-80 (1960).

²⁰⁰ See Pollak, *supra* note 199, at 54.

²⁰¹ Baker, *supra* note 199, at 140.

²⁰² Quoted in L. HAND, *Simon Flexner*, in *THE SPIRIT OF LIBERTY* 197 (3d ed. Dilliard 1960).

²⁰³ Reitz, *supra* note 199, at 465.

police acting on their own cannot be trusted.”²⁰⁴ *Betts v. Brady*, it is comforting to know, reflects the view that some fundamental rights can still be entrusted to some state officials. That judges and prosecutors, if not police officers, remain “appropriate guardians”²⁰⁵ of the Constitution.

As Judge Carroll Bond observed in the *Betts* case:

I have been struck by the care exercised even by prosecuting attorneys for the interests of prisoners who have had no counsel, at least so far as eliciting the truth in their favor has been concerned. . . . Certainly my own experience in criminal trials over which I had presided (over 2,000, as I estimate it), has demonstrated to me that there are fair trials without counsel employed for the prisoners.²⁰⁶

Δ: You seem to forget that Judge Bond was not addressing himself to the question whether a trial judge could always safeguard the rights of an unrepresented defendant but whether he could ever do so. Thus, he preceded the remarks you quote with the comment:

That every presiding judge will care for the interests of a defendant in every case if he is without counsel is, as argued, doubtless illusory. The argument that he can never do so is perhaps logical, but not always true.²⁰⁷

I think it is fair to conclude that all Judge Bond was saying was that many times there are fair trials without counsel employed for the prisoner and many times there are not. I fail to see how this aids your cause.

“All of the States now provide some method of appeal from criminal convictions”;²⁰⁸ significant recognition, you might say, that the possibility of trial error prejudicial to the defendant cannot be ignored *even when he is represented by counsel*. Significant recognition, too, that prejudicial error cannot be avoided by placing the ultimate responsibility on the prosecutor and trial judge.

Able court-appointed counsel for petitioners in *Griffin v. Illinois* disclosed that for most years since 1900 some 30 per cent or more of the Illinois criminal convictions reviewed on appeal were reversed.²⁰⁹ Such figures as could be found for 15 other jurisdictions were not greatly different.²¹⁰ No jurisdiction for any year had a percentage of reversal less than 12 per cent.²¹¹

II: Just what does this prove? I take it that most, if not all, of the Illinois cases reversed were cases where defendant had the benefit of counsel when convicted. How does this refute the argument that when defendant cannot afford counsel, and is not furnished any, the special obligation sensed by both

²⁰⁴ *McDonald v. United States*, 335 U.S. 451, 455–56 (1948).

²⁰⁵ “[H]istory shows . . . [the police] are not appropriate guardians of the privacy which the Fourth Amendment protects.” *Jones v. United States*, 362 U.S. 257, 273 (1960) (Douglas, J., dissenting).

²⁰⁶ Opinion denying habeas corpus relief; Record, pp. 26, 29.

²⁰⁷ *Ibid.*

²⁰⁸ *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

²¹⁰ *Id.* at 24–25.

²⁰⁹ Brief for Petitioners, pp. 21–22.

²¹¹ *Id.* at 25 n.6.

trial court and prosecutor will operate greatly to reduce, if not eliminate, prejudicial error?

Δ: A case by case study of the 34 convictions reversed by the Illinois Supreme Court during 1953–1954 was made by Griffin's counsel. Some of the bases for reversal were: insufficiency of evidence (11 cases); improper conduct on the part of the prosecutor, either in argument to the jury or in cross-examination of witnesses (5 cases); prejudicial remarks of the trial judge (2 cases); erroneous refusal of defendant's requested charges to jury (2 cases).²¹²

If you believe judges and prosecutors are gods, I guess you can assume that such a species of errors will be reduced or eliminated when the cautionary sanction of defense counsel is gone and the likelihood of challenging the proceedings that led to the conviction diminished, by reason of lack of funds and know-how. But if you believe judges and prosecutors are human, I'm afraid you have to assume quite the contrary.

Consider the remarks of a much-experienced and much-respected Voluntary Defender:

Frequently in the trial of an uncounselled defendant, I have heard the judge announce that he will protect the defendant's legal rights. An inexperienced observer of such a trial may take pride in a system which appears to show so much solicitude for the rights of an accused, but a lawyer who specializes in the trial of criminal cases recognizes the proceeding for the travesty that it is.

I have witnessed the agonizing scene in which an unrepresented defendant is asked by the court or the district attorney if he wishes to cross-examine a witness for the prosecution. Instead of asking a question of the witness in the proper form, the accused, startled and confused, makes a statement contradicting the testimony of the prosecuting witness. Not infrequently, this violation of the rules of trial procedure brings forth sharp official rebuke which quickly ends the defendant's abortive attempt at cross-examination.

I have heard a judge presiding over the trial of a criminal case inadvertently misquote the governing law to the serious detriment of the unrepresented defendant. And I have observed the district attorney, preoccupied with the next case, remain silent while an excessive and illegal sentence was imposed on the uncounselled defendant whose interest he had said earlier in the proceedings he would protect. The judge's erroneous statement of the law and the district attorney's failure to protect his uncounselled "client" are not hard to understand. The judge usually spends only a small portion of his time in criminal court and cannot be expected to be fully informed on the law of the immediate case. The district attorney, conditioned by his official experience to view a criminal case from the standpoint of the prosecution, is not apt to think in terms of moves, defenses and laws favorable to the defense.²¹³

²¹² *Id.* at 80–83 (Appendix B).

²¹³ Pollock, *Equal Justice in Practice*, 45 MINN. L. REV. 737, 741–42 (1961) (Defender, Defender Association of Philadelphia).

II: What are you telling me now? That every unrepresented defendant is actually prejudiced?

Δ: No, only that we can never tell whether or not he was.

II: Nonsense. Stop letting your imagination run wild. Think of the dreary, every-day stuff.

Δ: I am. I'm sorry, but I haven't seen a case yet where I cannot say that a lawyer might have helped.

B. *A Hard Look at the Betts Record*

II: Come, come. Many is the time where there is nary a suggestion "how a lawyer might have helped . . . unless he picked the lock on the jail house door."²¹⁴ Why, take *Betts v. Brady* itself. Consider the comprehensive statement of the facts in Judge Bond's opinion denying collateral relief (an opinion later paralleled in its entirety by a majority of the Supreme Court):

The issue tried in the present case was one of identity of the robber. There was no dispute of the robbery. The testimony of four men who were at the time at work about the store seems to leave no room for doubt of that. And these four witnesses testified to the defendant's identity as the robber, two of them from the appearance of the man alone, and two from his appearance and his voice, which, as exhibited on the hearing on the present application has enough peculiarity in it to aid in identification. One of these witnesses, Poole, had known the man when he lived nearby in Carroll County. Betts produced six witnesses from Hagerstown, some of whom lived in the house with him, and some nearby; and they all testified to an alibi at the time of the robbery. Betts himself declined to take the stand.

It is sufficiently proved that Betts was unable to employ counsel. But in this case it must be said there was little for counsel to do on either side. The fact of the robbery could hardly be disputed, as said. Betts briefly cross-examined the witnesses who identified him, and the situation seems to have been such that counsel could have done little more than prolong the cross-examination without advantage. And witnesses called by Betts needed no support by counsel. The problem presented to the trial court on the facts was a common one, and the decision of the judge, who saw the witnesses, could not be held wrong.²¹⁵

Δ: "[T]here is a challenge in trying to deal with the obvious—a challenge, for instance, to ingenuity or to ability to make the trite seem new."²¹⁶ Yes,

²¹⁴ *United States v. Morgan*, 346 U.S. 502, 517 (1954) (Minton, J., dissenting).

²¹⁵ *Record*, pp. 26, 30. To the same effect is Justice Roberts' opinion for the Court in *Betts v. Brady*, 316 U.S. 455, 472 (1942).

²¹⁶ Westwood, Book Review, 61 COLUM. L. REV. 948, 950 (1961).

The *Betts* case itself is especially challenging. For one commentator has suggested that "the result may have been influenced in some measure by the known high character of the trial judge [Forsythe, J., Chief Judge of the circuit and an associate judge for 34 years]," CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 189 n.12 (10th ed. 1948) (sugges-

let's take *Betts v. Brady*. It's as good a place as any to meet the challenge, to demonstrate that we can never be satisfied that the presence of counsel would not have affected the outcome.

Suppose *Betts* had confessed and the crucial issue had been the voluntariness of the confession. I suspect the spectacle of a layman, unaided by counsel, contesting that issue jolts even you. Now consider this: Only seven of Professor Edwin Borchard's representative collection of 65 known erroneous convictions involved a confession,²¹⁷ but mistaken identification of the accused was "practically alone responsible for twenty-nine of these convictions."²¹⁸ I might add that in twelve of these cases the accused was wrongly identified by four or more persons.²¹⁹

The late Judge Frank made a more recent study of 36 cases in which an innocent man was convicted. He concluded, in essence as did Borchard twenty-five years earlier, that "perhaps erroneous identification of the accused constitutes the major cause of the known wrongful convictions."²²⁰

II: Haven't we had enough background music? When are you going to put down your violin long enough to get back to the *Betts* record—and some specifics?

Δ: I'm thumbing through the record at this very moment. The first thing that hits you is that four witnesses did not identify *Betts* as the robber. Only one did: the victim.²²¹ He stated on direct examination²²² that he had never seen *Betts* before. And it can hardly be said that he had a good look at him the night of the robbery:

It was fairly dark but I could see that the man had on a dark overcoat and a handkerchief around his chin and a pair of dark amber glasses. The handkerchief was not over his chin. He also had on a hat. . . . I told [the police] that I wasn't sure I could identify him without the glasses and the handkerchief, after seeing him when it was almost dark that evening. . . . *Betts* put on the glasses and then I could identify him.²²³

The other three witnesses did not identify *Betts* as the robber, but only as somebody who had been in the general vicinity sometime before the robbery

tion not made in later editions). And another has speculated whether the *Betts* decision "would have been the same had the opinion of the court below been written by someone less highly esteemed than Chief Judge Bond of Maryland, who is referred to by name in Mr. Justice Roberts's opinion no fewer than fifteen times." FREUND, *Judge and Company*, in *THE SUPREME COURT OF THE UNITED STATES* 146 (1961).

²¹⁷ This point is made in MCCORMICK 229. See BORCHARD, *CONVICTING THE INNOCENT* 17, 36, 112, 146, 243, 277, 360, 371–72 (1932) [hereinafter cited as BORCHARD].

²¹⁸ BORCHARD 367.

²¹⁹ *Id.* at 379 n.1.

²²⁰ J. FRANK & B. FRANK, *NOT GUILTY* 61 (1957). To the same effect is BORCHARD 367.

²²¹ Record, pp. 10–11 (Bollinger).

²²² *Id.* at 12 (when questioned by the Court).

²²³ *Id.* at 11.

took place. Thus, two witnesses placed a man later identified as Betts in a branch building of the robbed company, about a half hour before the crime and some distance from the main store where the crime later occurred. I say "some distance" because one of the witnesses estimated the distance to the main store to be "about—well, it is not a quarter mile";²²⁴ the other put it at "about twenty-five yards."²²⁵ What the true distance really was is anybody's guess. For nobody at the trial seemed to care.

True, as Judge Bond pointed out, the third "vicinity-witness," a Mr. Poole, had known Betts before. What Judge Bond failed to point out was that Poole admitted on direct that he "hadn't seen" Betts "for four or five years,"²²⁶ and then conceded on cross that "it may be possible that I haven't seen you since 1923 [the trial took place in 1939]; I couldn't tell you just how long it's been; it's been a long time, I know that."²²⁷

Even to say that Poole and two others (Messrs. Duty and Miller) identified Betts as a person in the vicinity of the robbery is somewhat of an oversimplification. True, at the trial, the three vicinity-witnesses identified Betts, at least by implication, but this was five months after the event. "An identification . . . is a statement of opinion which may readily fail to withstand scrutiny but which . . . once established, tends to remain permanent. . . . [O]nce having made his identification, the witness tends to maintain it by a process of auto-suggestion which evidences itself in continually seeking means of justifying his opinion and reinforcing his belief. Questioned once more regarding the matter, the chances are that he would repeat, with perhaps even greater emphasis, his previous declaration."²²⁸ When did these three witnesses first make their identifications? Had they identified Betts in jail a short time after the robbery?

None of the three so much as suggested he had, let alone in what manner and under what circumstances. It remained for three police officers who followed them to the stand to bring out this matter. For example, the second of the three officers, Sheriff Shipley, disclosed that "Miller came down [to the jail] several days later [*i.e.*, after the robbery, and after the others had already identified Betts] and identified him. *They* said they could identify the man at the store."²²⁹

Apparently Miller, who hadn't yet identified Betts, had learned that others had. So he went to jail with these other persons [who had already identified Betts when he was first taken into custody and when he was the *only* suspect they were shown]²³⁰ and together they identified Betts; Miller for the first time, the others for the second. As Sheriff Shipley tells it:

²²⁴ *Id.* at 14.

²²⁶ *Id.* at 14.

²²⁵ *Id.* at 15.

²²⁷ *Id.* at 15.

²²⁸ Gorphe, *Showing Prisoners to Witnesses for Identification*, 1 AM. J. POLICE SCI. 79, 82 (1930).

²²⁹ Record, p. 18. (Emphasis added.)

²³⁰ *Id.* at 11, 17–19.

I think there were eight or ten in the jail, and I said, You boys go back and see if you can pick him out of the bunch. *Of course, immediately when they walked back, they picked him out.*²³¹

Of course.

Sheriff Shipley also testified that the victim himself and Messrs. Duty and Poole had identified Betts when he was first arrested.²³² So did the officer who preceded Shipley to the stand²³³—and the one who followed Shipley.²³⁴ Nobody in the courtroom seemed to have the faintest notion that ten years earlier the highest court of Maryland, in an opinion delivered by Chief Judge Bond, had taken the position—and this view was to remain unmodified for approximately thirty years²³⁵—that the testimony of a police officer concerning the identification made by the victim at the police station “was a reproduction of statements as proof of the facts asserted, and should have been excluded as hearsay testimony.”²³⁶

After listening to the officers testify about how the other witnesses had identified him at the jail, Betts probably assumed—quite understandably—that the way to attack the jail identification was to cross-examine the officers. He thus proceeded to demonstrate why the Maryland courts excluded identification testimony by police officers as hearsay:

Q. [Betts] Do you remember Mr. Poole looking at me a minute and saying: “Yes, I think that is the man,” and then a second remark was made and he said, “Yes, I believe that is the man.”

A. [Sheriff Shipley] Now, he might have said that. I wouldn’t contradict that because I don’t just remember.²³⁷

Poole was probably still in the courtroom, but neither trial judge nor prosecutor suggested how Betts could ask Poole himself these same questions. Small wonder that when a deputy sheriff followed Shipley to the stand and

²³¹ *Id.* at 18. (Emphasis added.)

²³³ *Id.* at 17 (Mason).

²³² *Ibid.*

²³⁴ *Id.* at 19 (Mathias).

²³⁵ See the discussion in *Judy v. State*, 218 Md. 168, 173–74, 146 A.2d 29, 31–32 (1958). See generally Comment, 19 MD. L. REV. 201 (1959).

²³⁶ *Blake v. State*, 157 Md. 75, 81, 145 Atl. 185, 188 (1929). Although Chief Judge Bond wrote the opinion of the court, he noted his disagreement with the majority on this point.

True, Betts was tried without a jury, but “the controlling reason for rejecting hearsay . . . is that the objector has the right to prevent the trier from being misled by testimony . . . fair on its face but carrying dangers that could be exposed or eliminated by cross-examination,” *not* the inability of the jury to put a fair value upon hearsay. 2 MORGAN, BASIC PROBLEMS OF EVIDENCE 248 (3d ed. 1961). The “accepted doctrine” is that “the same exclusionary rules apply to jury and non-jury trials.” *Id.* at 247. The many cases upholding findings based on hearsay “necessarily assume the capacity of the jury to value inadmissible hearsay. . . . Certainly no judge in a non-jury case is ever reversed for excluding hearsay which would be inadmissible in a jury case. Furthermore, error in the receipt of inadmissible hearsay in a jury case is almost always held to be cured by an instruction to the jury to disregard the hearsay.” *Ibid.*

²³⁷ Record, pp. 18–19.

also described how the victim and Poole had identified the defendant in the jail, Betts "waived" cross-examination.²³⁸

II: The crucial witness, the victim of the robbery, one Bollinger, did describe the circumstances surrounding his identification of Betts at the jail. And when the trial judge interrupted to ask him whether he was "positive that is the man," he answered in the affirmative.²³⁹ Let's get away from the vicinity-witnesses and back to the victim-witness, shall we?

Δ: In the first place, as I have already suggested, when a witness is asked to identify the accused at the trial, his "act of pointing out the accused . . . then and there in the court-room, is of little testimonial force. After all that has intervened, it would seldom happen that the witness would not have come to believe in the person's identity."²⁴⁰ This underscores the importance of the jail identification, but those circumstances were such as to make it most difficult to disassociate the victim-witness from the others.

According to Bollinger's testimony, he alone identified Betts at the jail. But it is quite clear from the testimony of the officers who followed him to the stand that this was not the case. As the first officer-witness pointed out, we "picked him [Betts] up and brought him back to jail here and the witness, the boy that was held up and Mr. Poole in the store, they were both over there."²⁴¹

There is reason to think that the jail identification was dominated by the older and supremely confident Poole—you will recall he was the one who was "sure" he had spotted Betts in the vicinity although perhaps he hadn't seen him "since 1923." Thus, the first officer testified that "we . . . brought the boy out that was held up and Mr. Poole, and they [evidently the victim and another vicinity-witness] identified him."²⁴² The second officer testified that he "was at the jail when Mr. Poole and the others identified Betts."²⁴³ Note, that as this officer saw it, Bollinger, the only eye-witness to the robbery itself, was just one of "the others." (Note, too, that when cross-examining the officers, Betts only tried to attack the identification by Poole.) Finally, the last officer to testify described how "Smoked glasses were put on Betts' eyes and a handkerchief around his neck like the man was supposed to have had that did the holding up, and Bollinger and Poole identified him as the man that held *them* up."²⁴⁴

Of course, nobody "held *them* up." Bollinger was all alone when he closed the store and walked to his car. At that point another car pulled up and the robber emerged. Poole claimed he saw Betts in the store shortly before closing time, but Betts wasn't wearing smoked glasses and a handkerchief then. What in blazes was Poole doing, identifying the jailed Betts—then wearing the outfit the robber was supposed to be wearing—as the man who held them up?

²³⁸ *Id.* at 19.

²³⁹ *Id.* at 11.

²⁴⁰ 4 WIGMORE § 1130.

²⁴⁴ *Id.* at 19. (Emphasis added.)

²⁴¹ Record, p. 17 (Mason).

²⁴² *Ibid.*

²⁴³ *Id.* at 18.

It has well been said that "Showing . . . prisoners to witnesses bears to the spontaneous answer the same relationship an experiment bears to observation. Hence, it seems to demand all possible guaranties of correctness."²⁴⁵

The recommendations of a Royal Commission, quoted with approval in Wigmore's great work,²⁴⁶ serve to illuminate the sloppiness that characterized the Betts jail identification. One of the precautions urged by the Commission is that "the witness should be introduced one by one and on leaving should not be allowed to communicate with witnesses still waiting to see the persons paraded."²⁴⁷ We have already seen how flagrantly this safeguard was violated in Betts' case. Not only did the robbery victim and at least one vicinity-witness come to the jail together and identify Betts together,²⁴⁸ but a few days later two vicinity-witnesses who had already identified Betts came to the jail again, together with a third—who had not yet seen Betts in jail—and all three proceeded to identify Betts together.²⁴⁹

The Commission also cautioned—and perhaps this is the most fundamental safeguard of all—that "the accused should be placed among persons who are as far as possible of the same age, height, general appearance and position in life."²⁵⁰ Wigmore, himself, urged that jail identification be conducted by presenting the person to be identified "in company with a dozen others of not too dissimilar personalities."²⁵¹

II: Surely you're not suggesting the Maryland courts would exclude jail identification testimony if less than that number were in the line-up?

Δ: No, not necessarily. A recent case let in testimony identifying the accused in the company of five others because various circumstances negated unfairness or unreliability.²⁵² On the other hand, even if he were one of a group of fifty, "of course it would have been obviously unfair and prejudicial to the suspect to have placed him in a group of pygmies, for example."²⁵³

Now, unlike some other possible lines of attack on jail identification, there is something in the Betts record on the "line-up" issue, and not because Betts developed the matter on cross-examination—there is not the slightest indication that he ever saw the issue—but because some of these circumstances were fortuitously, casually described by the state's own witnesses on direct examina-

²⁴⁵ Gorphe, *supra* note 228, at 79–80.

²⁴⁶ 3 WIGMORE § 786a, at 164–65 (1929 Royal Commission on Police Powers and Procedure).

²⁴⁷ *Id.* at 165.

²⁴⁸ See text accompanying notes 241–44 *supra*.

²⁴⁹ See text accompanying notes 229–31 *supra*.

²⁵⁰ 3 WIGMORE § 786a, at 165.

²⁵¹ *Id.* at 164.

²⁵² *Presley v. State*, 224 Md. 550, 556, 168 A.2d 510, 513 (1960), *cert. denied*, 368 U.S. 957 (1962).

²⁵³ *Ibid.*

tion. Betts' fellow-suspects, it turns out, were much smaller than the hypothetical "pygmies" whose presence would "obviously" preclude admissibility of the identification. They were invisible. The only man in the line-up the first day Bollinger and Poole came to the jail to identify the robber was Betts.²⁵⁴ The only voice Bollinger was permitted to hear when he identified Betts belonged to Betts.²⁵⁵

II: Just a minute. You're forgetting something, aren't you? Bollinger identified the dark coat, the smoked glasses and the handkerchief, didn't he?

Δ: I was coming to that. You have just touched on the most baffling and most disturbing feature of this whole case. *What* coat? *Whose* dark glasses and handkerchief?

Parts of the record read as if Bollinger might be identifying Betts' coat:

Defendant. Q. Mr. Bollinger, the night of the 24th you said I was supposed to be dressed in a dark overcoat.

A. Yes, sir, dark. Of course, they had gray on you down here [in the jail], but it was dark [the night of the robbery].

Q. Then you identified the gray overcoat to be the dark one?

A. I identified that to be the coat.

Court. Q. You mean the coat he had down here [wore when identified in the jail]?

A. Yes, sir, because it was bagged at the pockets and everything, the same as it was when he was over there that night? [*sic*]

Q. Was it dark gray or a light gray coat?

A. Dark gray.²⁵⁶

Is it possible that the coat Bollinger "identified" at the jail was simply one the police procured from somebody other than Betts—pursuant to Bollinger's own description of the dark gray, bagged-pocketed coat the man wore who robbed him?

Even if a coat were offered in evidence, "objects or things offered in evidence do not generally identify themselves."²⁵⁷ The object must be shown to

²⁵⁴ Record, pp. 11, 17-19.

²⁵⁵ *Id.* at 12, 17-19. After Bollinger—without even alluding to Betts' voice—told how he had identified Betts at the jail—the prosecutor asked a classic leading question: "Before you saw Smith Betts over at the jail, did you hear anything? Did you hear him speak or anything like that?" *Id.* at 11. Bollinger then proceeded to testify that he had first identified Betts by his voice. *Id.* at 12. We do not know what Betts said at the jail, or what, if anything, the police instructed him to say.

It seems Bollinger listened along with Poole (who had been neither an eye- nor an ear-witness to the robbery itself, but who knew Betts), *before* identifying Betts' voice. *Id.* at 17. Of course, Poole could have gestured to or otherwise communicated with Bollinger in the meantime. The only testimony of any detail on this voice identification is Sheriff Shipley's: "Bollinger shook his head like as if he recognized the voice." *Id.* at 18. The ambiguity is almost infinite.

According to Officer Mason, Bollinger identified Betts "as the voice that told him to put his hands up." *Id.* at 17. That the robber issued such a command or one approximating it finds no support in Bollinger's own testimony. *Id.* at 10-12.

²⁵⁶ *Id.* at 12.

²⁵⁷ MCCORMICK 384.

have some connection with Betts. Not only was this not done; no coat was ever offered in evidence.

None of the officers testified that Betts was wearing a dark gray overcoat (or any overcoat for that matter) when they "picked him up." Or that such a coat was found in his apartment. All they said was that "we put this dark gray overcoat on him."²⁵⁸ Indeed, the state failed to establish that Betts even owned a dark gray overcoat. One of Betts' alibi witnesses was asked about this on cross-examination; the answer was that Betts owned a "*real light* gray overcoat."²⁵⁹ The prosecution did not pursue the matter any further. Betts didn't pursue the matter at all.

As for the other items, there was testimony by the state that "smoked glasses were put on Betts' eyes and a handkerchief around his neck like the man was supposed to have had that did the holding up."²⁶⁰ But once again, no handkerchief or glasses were offered in evidence. Presumably, Betts owned a handkerchief or two, but once again, the state failed to establish that he even owned a pair of dark glasses. One alibi witness who was asked about this on cross simply did "not know,"²⁶¹ and the matter was dropped.

Why did the state fail to offer any of these items in evidence? Why was one of Betts' own witnesses cross-examined, albeit casually, about the defendant's ownership of a dark gray overcoat and smoked glasses? If the state had possessed these items, why would it have asked such questions?

Although the matter is not free from doubt—because neither trial judge nor prosecutor seemed to care much and Betts evidently failed to realize how this would weaken the state's case—it is difficult to avoid the conclusion that the following "bootstraps" operation occurred: Bollinger described to the police the various items the robber was supposed to have worn; the police simply went out, begged or borrowed the requisite coat, glasses and handkerchief, and slapped them on Betts; Bollinger then made his identification, based largely on the coat, glasses and handkerchief the police had put on Betts.

It is not amiss to compare the *Betts* case with the *Larkman* case, one of the known wrongful convictions collected by Judge Frank. Aware that the robber-killer they were seeking had worn dark glasses at the time, the police arrested one Larkman, who had a record of petty offenses, and exhibited him to an eye-witness not by putting him in a line-up, but by forcing him "to stand alone under a bright light and to wear a pair of dark glasses."²⁶² Larkman was thus identified and later convicted. Four years after he had been found guilty, another man confessed to the same killing. Another four years later, a special investigator, "recommended a pardon, mainly on the basis of the method of identification used by the police, a fact about which . . . [he] had just learned."²⁶³

²⁵⁸ Record, p. 17.

²⁶⁰ *Id.* at 19 (Officer Mathias).

²⁵⁹ *Id.* at 22 (Mrs. Uhler).

²⁶¹ *Id.* at 22 (Mrs. Uhler).

²⁶² J. FRANK & B. FRANK, NOT GUILTY 188 (1957).

²⁶³ *Id.* at 189.

The fact that a coat, dark glasses and a handkerchief were put on Betts at the jail raises still another question, a nice one about self-incrimination.

II: Come, come. The prohibition is against "the use of physical or moral compulsion to extort communication from . . . [a person], not an exclusion of his body as evidence when it may be material."²⁶⁴ That the privilege only protects against "testimonial compulsion" has been "expounded by Wigmore and widely accepted in recent opinions."²⁶⁵

Δ: I'm not interested in the better view or the majority rule or the recent trend. I'm only interested in what a Maryland lawyer in the Maryland courts might have done for Betts back in the year 1939. In 1944, the highest court of Maryland considered "just how far the prosecution may go . . . in compelling . . . [the defendant] to perform some affirmative act to aid the State in connecting him with the crime, such as trying on a hat,"²⁶⁶ and noted that "in Maryland there is no adjudicated case at all . . . in point, and the decisions of the courts of other states are widely divergent and often conflicting."²⁶⁷ Back in 1939, then, the circumstances surrounding Betts' jail identification did pose a formidable self-incrimination problem.

Not to keep you in suspense, when (five years after Betts' trial) Maryland did consider the question in *Allen v. State*,²⁶⁸ it adopted the minority view that draws the line "between enforced *passivity* on the part of the accused and enforced *activity* on his part."²⁶⁹ Thus, to require the accused, while on the witness stand, to try on a hat found at the scene of the crime was to compel him "to perform an evidence-producing act"²⁷⁰ and to commit reversible error.

II: Not so fast. The hat incident you talked about took place at the trial itself; the coat and glasses were put on Betts at the jail, months before the trial. Whatever the result in a particular jurisdiction when the act takes place in court, "when clothing and individual are brought together and scrutinized outside of court, so that the process can come to the triers' attention only by testimonial description, the holdings in general deny any infringement upon privilege against self-incrimination."²⁷¹

Δ: Once again, I must point out that "holdings in general" are more or less beside the point. The question presented is what a Maryland court would have done at the time if Betts had had a lawyer and he had raised this point.

²⁶⁴ *Holt v. United States*, 218 U.S. 245, 252-53 (1910) (Holmes, J.).

²⁶⁵ *McCORMICK* 264.

²⁶⁶ *Allen v. State*, 183 Md. 603, 607-08, 39 A.2d 820, 822 (1944).

²⁶⁷ *Id.* at 606, 39 A.2d at 821.

²⁶⁸ *Id.* at 603, 39 A.2d 820.

²⁶⁹ *McCORMICK* 265 (citing *inter alia*, *Allen v. State*).

²⁷⁰ 183 Md. at 613, 39 A.2d at 824.

²⁷¹ *MAGUIRE, EVIDENCE OF GUILT* 26 (1959).

True, the 1944 *Allen* opinion does rely heavily on an Oklahoma case²⁷² that did distinguish between those cases where the defendant, himself, was a witness and those where "comparisons and experiments are made outside of court,"²⁷³ but *Allen* refers, with apparent approval, to a Tennessee case²⁷⁴ wherein, as the Maryland court describes it, the court "held, in effect, that to require the accused, *either in or out of court*, to make footprints in order that they might be compared with those in the vicinity of the crime, would be requiring him to give testimony, and therefore [be] an invasion of his constitutional rights."²⁷⁵ I must admit that the fact that the accused was made to participate in an experiment conducted in open court was considered a plus factor in *Allen* for invoking the privilege—but not a prerequisite.²⁷⁶

II: I am still convinced that Betts would not have prevailed on the self-incrimination issue in Maryland back in 1939.

Δ: I just don't know—and neither do you. Indeed, I don't know that Betts would have been acquitted or his conviction set aside if he—rather his lawyer—had fully developed any or all of the points I have raised. However, I think I do know this much. Their "mere existence dramatically illustrates that even in the most routine-appearing proceedings the assistance of able counsel may be of inestimable value."²⁷⁷

II: I've been meaning to ask you what may be an embarrassing question.

²⁷² *Ward v. State*, 270 Okla. Crim. 362, 228 Pac. 498 (1924).

²⁷³ 183 Md. at 609, 39 A.2d at 823.

²⁷⁴ *Stokes v. State*, 64 Tenn. 619 (1875).

²⁷⁵ 183 Md. at 610, 39 A.2d at 823.

²⁷⁶ "If the accused, especially if in open court and on the witness stand, is made to [furnish evidence] . . . by performing an act or experimentation which might aid in connecting him with the crime and establishing his guilt, it is inadmissible." *Id.* at 611, 39 A.2d at 823. The fact that the accused testified would seem to cut the other way; "Even if the privilege be considered to extend so far, it should have been held to be waived by taking the stand." *McCORMICK* 265 n.18.

²⁷⁷ *Reynolds v. Cochran*, 365 U.S. 525, 532–33 (1961). That the jail identification of Betts posed substantial self-incrimination questions back in 1939 is not controverted by the fact that in two cases involving the use of blood tests as a link in the chain of evidence, Maryland courts later distinguished *Allen*, limiting it to situations where defendant is compelled to produce evidence in the courtroom. *Shanks v. State*, 185 Md. 437, 444, 45 A.2d 85, 88 (1945); *Davis v. State*, 189 Md. 640, 644–45, 57 A.2d 289, 291 (1948). Indeed, the blood test cases can, in turn, be distinguished. For, in accord with the line drawn in *Allen* between "enforced passivity" and "enforced activity," the accused may be required to submit to fingerprinting and the extraction of blood. The latter are but instances of enforced passivity on the part of the accused, unlike occasions where he is compelled to do an "affirmative act," e.g., place his foot in a track, put on a hat. See *McCORMICK* 265, n.21.

In *Journigan v. State*, 223 Md. 405, 411–12, 164 A.2d 896, 900 (1960), appellant contended that his privilege against self-incrimination was violated when a policeman was permitted to testify that he would not try on a hat found at the scene of the crime. The court observed that the *Allen* case "went no further than to hold that the privilege embraces 'the involuntary furnishing of evidence by the accused by some affirmative act in open court . . .';" but pointed out that "we do not need to pass on the merits . . . on this point . . . for the testimony objected to came in later without objection from another witness."

When *Betts* reached the Supreme Court on habeas, did counsel for petitioner bother to make any analysis of the trial? Did he present any specific examples of how *his client might have been prejudiced below absent counsel?*

Δ: No, he didn't. I'm afraid he was a bit overconfident. On the basis of language in *Johnson v. Zerbst*²⁷⁸ and pre-*Betts* fourteenth amendment due process cases,²⁷⁹ he no doubt supposed—not without reason²⁸⁰—that the High Court would apply the full measure of the sixth amendment right to counsel to the states.

Π: All right. Maybe *Betts* does demonstrate that trial judge and prosecutor can boot one, but it also illustrates how defense counsel can. Where does that get us?

Δ: Look, I never claimed that overruling *Betts* would rid the world of all injustice. "Perfection may not be demanded of law, but the capacity to counter-act inevitable . . . frailties is the mark of a civilized legal mechanism."²⁸¹ All I'm saying is that the presence of counsel goes a long way toward supplying that capacity. Much further than relying upon "the goodness of heart of anybody,"²⁸² even trial judge and prosecutor.

A judge who made fewer mistakes than most once said that he "should like to have . . . written over the portals of . . . every court house" the message Oliver Cromwell wrote the Scots shortly before the Battle of Dunbar: "I beseech ye in the bowels of Christ, think that ye may be mistaken."²⁸³ Maybe we can't honor that request, but we can go one step further. We can put a defense lawyer in every courtroom.

Π: If you don't mind, let's leave Mr. Cromwell and get back to Mr. Betts. If prejudicial error has been committed against the unrepresented defendant, then *Betts v. Brady* comes into play. The error will be corrected on appeal or by means of collateral attack. If what you say about the *Betts* trial is true then that conviction should have been vacated. The fact that it was not, only proves that the rule was misapplied in the mother case, not that the rule itself is ill-conceived.

Δ: I think the *Betts* record cries out for the talents of trained defense counsel. This is a windfall for those who urge the scrapping of the rule that bears its name, yet it is off the main point. All records may not so patently demonstrate the need for counsel. All prosecutors may not be so obliging in this regard as the one who prosecuted *Betts*.

²⁷⁸ 304 U.S. 458 (1938).

²⁷⁹ *Smith v. O'Grady*, 312 U.S. 329, 334 (1941); *Avery v. Alabama*, 308 U.S. 444, 445-47 (1940); *Powell v. Alabama*, 287 U.S. 45, 68-69, 71 (1932).

²⁸⁰ See Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8-9 (1956).

²⁸¹ *Rosenberg v. United States*, 346 U.S. 273, 310 (1953) (Frankfurter J., dissenting).

²⁸² Cf. Brandeis, quoted in MASON, *BRANDEIS: A FREE MAN'S LIFE* 149 (1946).

²⁸³ L. HAND, *Morals in Public Life*, in *THE SPIRIT OF LIBERTY* 229 (3d ed. Dilliard 1960).

II: All right, what about the good looking records? The ones which establish that the defendant was not disadvantaged by the absence of counsel? This is the case the *Betts* rule governs.

C. *Some Speculation About the Betts Case*

Δ: What do you mean "establish that the defendant was not disadvantaged by the absence of counsel?" A record can "establish" no such thing. It can only *fail* to establish on its face that the defendant was disadvantaged. What does it prove that the record reads well? How would it have read if the defendant had had counsel? What defenses would have been raised then which are not suggested now? We don't know and we never will. This is the main point, the one *Betts* misses. To illustrate, permit me to return to the *Betts* case itself once again.

We know that *Betts* applied for a jury trial and then, a few days later, withdrew the application.²⁸⁴ We do not know why. We are told "there is no easy rule of thumb" for deciding whether a jury should be waived; "throughout your trial practice in the criminal field this will be a matter of considerable discussion and intensive study on each occasion."²⁸⁵ How much and what kind of study did *Betts* give this problem?

"[T]he most important decision a lawyer has to make" at the trial itself has been said to be "whether or not to put his client on the stand."²⁸⁶ *Betts*, of course, had to make this decision himself; he declined to take the stand. We do not know why. Did he have a plausible story to tell? Would he have made a good witness? Is it possible that *Betts* remembered, from his one prior prison stay, the advice of some "jailhouse lawyer" about never taking the stand if you have a prior conviction—without drawing a distinction between cases tried with and without a jury?

The record discloses that three defense witnesses for whom subpoenas were issued were not summoned;²⁸⁷ that the summons for one "arrived at the Sheriff's Office . . . on the day of the trial and therefore could not be served in time."²⁸⁸ Who were these witnesses? Would they have added anything to the defense? Would they have been more convincing than the witnesses who did appear? Again, we just don't know. We do know this much. In his first habeas corpus petition (prepared and heard without the aid of counsel), *Betts*, as Judge Bond later described it, "pressed chiefly an objection that some witnesses desired for the defense on his trial had not been summoned by the sheriff."²⁸⁹

²⁸⁴ Record, p. 2.

²⁸⁵ Comisky, *Elementary Criminal Procedure for the General Practitioner*, 6 PRAC. LAW. 76, 77-78 (1960).

²⁸⁶ Levy, *Some Comments on the Trial of a Criminal Case*, in 2 MANUAL FOR PROSECUTING ATTORNEYS 682 (Ploscowe ed. 1956).

²⁸⁷ Record, p. 10.

²⁸⁸ *Ibid.*

²⁸⁹ *Id.* at 26.

One of Betts' alibi witnesses, a George Uhler, seems to have done much more harm than good. He didn't seem to know whether the robbery had taken place on a Friday or a Saturday or whether he had been with Betts on Friday or Saturday. The prosecutor pressed George hard on this point on cross-examination. Of course, Betts didn't help matters any by suddenly shouting from the courtroom, "It was Friday, George,"²⁹⁰ particularly since the robbery had occurred on Saturday evening. George finally admitted he just "couldn't say what day it was."²⁹¹

Should George have been called at all? When, if ever, had Betts gone over his testimony with him? When, if ever, had Betts gone over any of his witnesses' testimony? Again, we don't know. We do know that the prosecution witnesses were significantly more confident and sure-footed.

A word more about the prosecution witnesses. In some respects their testimony was remarkably consistent. Was one of the reasons the fact that they were all in the courtroom all the time, listening to each other testify? We are told that there are occasions when "it may be important for counsel to move for the segregation of witnesses . . . particularly where a number of witnesses will testify to the same thing, such as identification witnesses."²⁹² Was Betts aware that he could make such a motion?

Betts was a close associate of one Ells Dunn and it seems the two men spent much time together in the days immediately preceding the robbery.²⁹³ The prosecution's three vicinity witnesses all testified that Betts "was with another fellow" shortly before the crime occurred.²⁹⁴ And the robbery victim reported that "there was another fellow in . . . [the robber's] car."²⁹⁵ We know nothing about Dunn (so far as appears, not even a warrant was issued for his arrest), but running through the record is the clear implication that he took part in the robbery with Betts and that he was the man with him shortly before the crime occurred.

There is virtually nothing in the record, however, to support this implication. The man supposed to be with Betts shortly before the robbery "was not quite as tall [as Betts] . . . and a little heavier built,"²⁹⁶ but we do not know whether this description fits Dunn nor even whether it fits the description of the other man involved in the robbery, for the victim did not identify this second man in any way.

If Dunn were shorter and somewhat heavier than Betts, why didn't the prosecution make the point? On the other hand, if Dunn did not fit this description, why didn't Betts say so? There is reason to think that Betts, at least, might have simply missed its significance. We know this much: Accord-

²⁹⁰ *Id.* at 21.

²⁹¹ *Ibid.*

²⁹² Comisky, *supra* note 285, at 85-86. See 3 WIGMORE § 786.

²⁹³ Record, pp. 17, 23.

²⁹⁵ *Id.* at 11.

²⁹⁴ *Id.* at 13, 14, 16.

²⁹⁶ *Id.* at 16.

ing to the victim the two robbers drove a "1930 Chevrolet Coach, with a green body and red wheels,"²⁹⁷ but Betts didn't own a car at all and Dunn owned "a 1928 Chevrolet with blue body and black fenders."²⁹⁸ The disturbing feature is that Betts did not point out that Dunn's car was not the one involved in the robbery; the prosecutor did. The prosecutor brought this out, casually, haphazardly, in his cross-examination of a Betts alibi witness, then quickly moved on to another matter.²⁹⁹

Despite the prosecutor's half-hearted inquiries along these lines,³⁰⁰ there is no indication that Betts was acquainted with anybody who owned a 1930 green Chevrolet or that such a vehicle was recently reported as stolen. Nobody at the trial seemed to care very much. Would a competent defense lawyer have cared?

I have dwelt at some length on the fact that the identification of Betts at the jail left much to be desired. Permit me to pursue this point still further.

One of the precautions urged is that witnesses "should . . . have no assistance from photographs or descriptions,"³⁰¹ before identifying the accused in the flesh. We do know that Betts had served time for another offense and his picture could have been withdrawn from the "rogues gallery" and shown to the witnesses before they saw him in the jail. But we simply don't know whether this safeguard was violated, because Betts never pursued this line of inquiry. The thought probably never entered his head. Wouldn't a competent defense attorney have been likely to ask whether the police first showed the witness a photograph, or otherwise provoked an identification?

We know this much: Borchard's study of known erroneous convictions reveals that "witnesses are often persuaded to make identifications by suggestions of the police."³⁰² We know, too, that the practice of first exhibiting to witnesses a single photograph for purposes of identification poses great dangers; "for the psychological factors of such an exhibition . . . favor identification rather than repudiation of identity."³⁰³

The officer conducting the jail identification has also been cautioned to record every circumstance, "whether the accused or any other person is identified or not."³⁰⁴ How many other clerks and customers were there in the two stores Betts was supposed to have visited that we just don't know about? Again, we draw a blank because Betts never pursued this line of inquiry.

²⁹⁷ *Id.* at 11.

²⁹⁹ *Ibid.* (Fletcher).

²⁹⁸ *Id.* at 23.

³⁰⁰ *Id.* at 21-23.

³⁰¹ Recommendation of 1929 British Royal Commission, quoted with approval in 3 WIGMORE § 786a, at 165.

³⁰² BORCHARD 374. To the same effect is J. FRANK & B. FRANK, NOT GUILTY 62-63 (1957).

³⁰³ BORCHARD 261.

³⁰⁴ Recommendation of 1929 British Royal Commission, quoted with approval in 3 WIGMORE § 786a, at 165.

To move on to another point, what about vicinity-witness Poole, the man who seems to have dominated the jail-identification proceedings? If Poole did remember Betts, why would he have after as much as sixteen years? He testified that Betts' "father used to live and farm not very far from where I lived."³⁰⁵ For that reason, when he saw Betts years later, on the night of the robbery, he had "no doubt that it was he."³⁰⁶ Years earlier, when the Poole and Betts families were neighbors, did some fight or quarrel take place that caused Poole never to forget Betts—and to develop a hostility towards him? "The law recognizes the slanting effect upon human testimony of the emotions or feelings of the witness toward the parties,"³⁰⁷ but did Betts know this? If Betts had had the aid of a lawyer, who knows how biased Poole might have been made out to be?

Finally, how sound were Betts' alibi tactics? The record might have read well, very well, because Betts banked his all on an alibi defense. "An innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs,"³⁰⁸ but Borchard's study documents the obvious: "Proof that an alibi . . . was false, though in fact the accused had nothing to do with the crime, was extremely prejudicial, if not fatal, in several cases."³⁰⁹

If Betts had had a lawyer, he might well have scrapped the alibi defense entirely and managed to use the state's vicinity-witnesses *to his advantage*. For example, one of the vicinity-witnesses concluded from Betts' "appearance" and "the way he talked" that "I would judge he was drinking."³¹⁰ Some minutes afterwards, the robbery occurred. The robber stood quite close to Bollinger and spoke to him at very short range.³¹¹ Did Bollinger smell any liquor on the man's breath? Detect anything about his manner of speaking to indicate he had been drinking? These questions were not asked, but Bollinger never suggested that the man who robbed him had been drinking. If this point had been pressed on cross-examination, the state's witness who "judged" shortly before the robbery occurred that Betts had been drinking might have emerged as an important witness for the defense.

Similarly, although Bollinger insisted that the man who robbed him wore a dark gray goat, none of the state's three vicinity-witnesses had a thing to say about the shade or color of Betts' coat. Evidently, Betts owned a "real light" coat.³¹² If he did, and he had worn it the night of the robbery, and he had pressed the vicinity witnesses about this on cross-examination, again one or more of them might have wound up making a significant contribution to his defense.

³⁰⁵ Record, p. 14.

³⁰⁶ *Ibid.*

³⁰⁷ McCORMICK 82.

³⁰⁸ *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 317 (1810) (per Shaw, C. J.).

³⁰⁹ BORCHARD 373-74.

³¹¹ *Id.* at 11.

³¹⁰ Record, p. 16.

³¹² *Id.* at 22.

D. *Another Vantage Point: The Manceri Case*

II: I must say that if you've done nothing else, you've exhibited a considerable amount of ingenuity.

Δ: Perhaps I can drive the point home by striking from another angle. Let's turn it around, shall we? Let's take a much-publicized recent case where defendant had a lawyer and gained an acquittal and speculate about whether he would have been convicted—and how well the record might have read—if he had been without the services of a lawyer.

I am referring to the *Peter Manceri* case, the subject of a full-hour television documentary only last year.³¹³ You will recall that in the summer of 1959, fifteen-year-old Manceri was accused of beating and stomping to death a sixty-five-year-old man in a Brooklyn park and charged with first degree murder. The state's main witness was Manceri's thirteen-year-old girl friend, Dorothy. She insisted that when the deceased chided them for "petting" in the park, Peter beat him to death: "He's good in fighting—and he stomped and kicked an old man to death."³¹⁴

Dorothy told a convincing story. From his remarks at the time, it is fairly clear the judge who arraigned Manceri believed he was guilty.³¹⁵ So did the press. When Manceri was freed on \$5,000 bail, over the protests of the state, the press raised such a furor that bail was revoked.³¹⁶ After the trial was over the foreman of the jury commented: "All the stories that I read prior to the trial showed that Peter Manceri was guilty."³¹⁷

The assistant district attorney assigned to the case believed Dorothy's story, too. He had gone "out of his way to try and trick her into seeing whether she was or was not telling the truth," but she emerged from these "many hours of examination" undamaged and undaunted.³¹⁸ Indeed, so much did this assistant prosecutor believe Dorothy that after Manceri's acquittal he told the press: "I was and still am convinced that Manceri is the person who did it."³¹⁹

II: I'm confused. We're talking about a fifteen-year-old with no prior brush with the law who is standing trial for a capital offense. Obviously, he'd be entitled to counsel under *Betts v. Brady*—for any one of several reasons. Just what are you trying to prove?

Δ: I'm talking about a real case, a recent case. I've chosen it because, unlike most other criminal cases that end at the trial level, there happens to be a great deal of information available about this one. I can't change the age of

³¹³ Transcript of *A Real Case of Murder: The People vs. Peter Manceri*, presented on "CBS Reports," March 2, 1961, copy on file in University of Minnesota Law School Library [hereinafter cited as *Manceri*].

³¹⁴ *Manceri* 5.

³¹⁷ *Id.* at 22.

³¹⁵ *Id.* at 7.

³¹⁸ *Id.* at 11.

³¹⁶ *Id.* at 13-14, 31.

³¹⁹ *Id.* at 27.

the defendant or the degree of the offense. But I can say these are distinctions without a difference. I'm talking about what an uncounselled defendant is likely to do in this kind of predicament as contrasted with what a trained lawyer is likely to do. Suppose Manceri were twenty-five or thirty-five? How much more "law" would he know at that age? How much better would he be at cross-examination? Suppose the charge were manslaughter? Or the maximum punishment were life imprisonment? What does this change? Wouldn't he still be asking: How do I defend myself? Where do I begin? Wouldn't his plight still be the same?

A man who knew more law than most once reflected:

I don't know how you would feel, but I know how I would feel if I got a notice of having broken a regulation about putting milk out on the window sill: I'd probably stay awake all night thinking about it. But think of a person who knows nothing about it—maybe when you learn a lot about it it is worse—but, anyway, he would be troubled about it, and deeply troubled.³²⁰

To return to the *Manceri* case, when, in an effort to elicit a confession from him, the authorities confronted the defendant with his young accuser, he "laughed" at her story.³²¹ His interrogators only regarded this as proof that he was "a crazy kid," "a punk."³²² He would have to do better than that at the trial, much better.

For purposes of discussion, let's suppose that Manceri had had no lawyer.

What could he have done at the trial? Break down Dorothy's story? How could he have succeeded where a skillful prosecutor had already failed? How could he have impaired her testimony after she had emerged unshaken—and no doubt toughened—by hours of questioning in the district attorney's office?

Even if he were twenty-five or thirty-five, the odds were high that Dorothy would have told a more convincing story. The probabilities were that Manceri would have faltered here and been caught up in at least a few inconsistencies there. After all (still supposing he had no lawyer), Manceri hadn't gone over his story with a trained person, Dorothy had. After all, Manceri himself would be cross-examining Dorothy; but Dorothy would not be cross-examining him, a skillful prosecutor would be.

Bear with me. Suppose that an unrepresented Manceri had been found guilty. Wouldn't the record have "read well?" A simple case, no? Dorothy's word against the defendant's—an issue peculiarly for the triers of fact, no?

Of course, an uncounselled Manceri need not have stood pat. For example, he might have come up with an alibi defense. If he had, he would have been

³²⁰ L. Hand, *Remarks on Seventy-Fifth Anniversary of Legal Aid Society*, 49 *LEGAL AID REV.* 10, 14 (1951).

³²¹ *Manceri* 5.

³²² *Ibid.*

chopped down most abruptly. Too many persons had seen him leave the park that fatal day.³²³ All this would have made a "fair trial" look still "fairer."

II: All right, Manceri had a lawyer. What did he do?

Δ: Although the police and the prosecutor had kept this information to themselves, the old man Manceri was supposed to have murdered had talked to a detective before he died, and what he had said was at variance with Dorothy's story.³²⁴ Several reasons were later given for not disclosing this information: The victim was "incoherent" at the time; the statements were "hearsay"; and "we had no obligation, under the law, to disclose all of our evidence."³²⁵ Somehow, Manceri's lawyer learned about this—or at least that the old man had told a detective something before he died. Thus, in presenting its case, the defense requested and received police reports which disclosed that according to the murder victim, an unknown person for no apparent reason had struck him from behind while he was sitting on a bench.³²⁶ This conflicted with Dorothy's version that the old man was standing, facing Manceri, when the boy struck him for scolding them about petting in the park.³²⁷

"After considerable argument," the trial court admitted the old man's remarks as "spontaneous-declaration" exceptions to the hearsay rule,³²⁸ the state presenting no evidence at the trial to the effect that the old man was irrational or incoherent at the time he made these statements. The foreman of the jury that acquitted Manceri later commented, "I would say the evidence that influenced the jury the most was what [the deceased] told the police about the crime."³²⁹

Manceri's lawyer also talked to various people in the boy's neighborhood. He met and interviewed three young girls who revealed that Dorothy had told them she had lied to the authorities about Manceri.³³⁰ He also spoke with Dorothy herself.³³¹ He investigated further, learning that from the time that her mother died, Dorothy had been a "street urchin" who even went so far as to steal whiskey from her father to attract attention from boys.³³² He developed the thesis that Dorothy (without realizing all the implications) had lied to the authorities in order to achieve "her moment of glory," the attention she craved by being "the star witness" in a murder trial.³³³

II: The defense never disclosed that it had these three witnesses until the case went to trial. If it had made this disclosure earlier, there might not have been a trial at all.

Δ: I think not. You will recall that after these girls had testified, even after the acquittal, the prosecutor remained convinced that Manceri was guilty.

³²³ *Id.* at 3.

³²⁷ *Id.* at 17.

³²⁴ *Id.* at 17.

³²⁸ *Id.* at 22.

³³¹ *Id.* at 16.

³²⁵ *Id.* at 18, 23.

³²⁹ *Id.* at 23.

³³² *Ibid.*

³²⁶ *Id.* at 17, 22.

³³⁰ *Id.* at 14.

³³³ *Id.* at 17.

Manceri's lawyer kept this information quiet because "with the police checking and coming to the homes of these young girls, perhaps their parents might become fearful, and influence these young girls."³³⁴ After the trial, one of the girls who attacked Dorothy's credibility reported receiving "crank phone calls all hours of the day and night, saying that they were going to get me."³³⁵ If the press and public had known prior to the trial that these girls were going to testify on behalf of "this hulking child [who had kicked] the brains out of [an] innocent old man,"³³⁶ the pressure might have been intolerable. In short, even if Manceri had found and interviewed these three girls without the guiding hand of counsel, he might well have lost them as witnesses by tipping his hand.

II: Manceri's lawyer had another and less noble reason. He calculated that when the case went to trial, the state would find it difficult to discredit his surprise witnesses without the background information necessary for thorough cross-examination.³³⁷ By the way, is this supposed to be the way defense attorneys search for truth?

Δ: What truth was the prosecution pursuing when it kept quiet about the old man's dying statements? As Chief Judge Desmond said of the case: "There's always going to be an element of the game in this. You condemn it by using a word like 'game,' but this is our tradition, that it is a game."³³⁸

It's too bad this is the way it has to be, but so long as this is the way³³⁹ then it's comforting to know that Manceri had somebody on his side who could play the game. What about the thousands who don't?³⁴⁰

II: I take it we're back to *Betts v. Brady*.

E. The Need for the "Fact-Gathering" Services of a Lawyer

Δ: As the *Manceri* case well illustrates, a defendant may need the services of a lawyer outside the courtroom much more than inside. For example, before Manceri's lawyer could get the remarks of the murder victim into evidence

³³⁴ *Id.* at 20.

³³⁵ *Id.* at 25.

³³⁶ *Id.* at 13 (newspaper editorial criticizing decision granting Manceri bail).

³³⁷ *Id.* at 20.

³³⁸ *Id.* at 29.

³³⁹ "If only Mr. [Irving] Goldstein himself had written his book as an exposition of the evils inherent in our adversary system of litigation. . . . But a decent respect for the truth compels the admission that Mr. Goldstein has told his story truly. He has told it calmly, without pretense of shame, and (God save us!) without the slightest suspicion of its shamefulness. He has shown by his own unperturbed frankness with what complaisance the profession, which would smile the superior smile of derision at the suggestion of a return of trial by battle of bodies, accepts trial by battle of wits." Morgan, Book Review, 49 HARV. L. REV. 1387, 1389 (1936).

³⁴⁰ This point was touched upon by Dean Erwin N. Griswold, who appeared at the end of the program. *Manceri* 29-30. Two short months after *Betts* was handed down, Dean Griswold co-authored (with Benjamin Cohen) a much-cited letter to the N.Y. Times, highly critical of the decision. N.Y. Times, Aug. 2, 1942, § 4, p. 6E, col. 5, reprinted in part in *Bute v. Illinois*, 333 U.S. 640, 677-78 n.1 (1948) (Douglas, J., dissenting).

as an exception to the hearsay rule, he first had to learn, or have reason to suspect, that such statements existed.³⁴¹

It is no secret that "much of the prosecutor's work will be done outside the courtroom";³⁴² why is it so difficult to realize that the same goes for the defense attorney? The Public Defender of Los Angeles County has used strong words to make this point:

I have noted with disgust, from time to time, remarks made by appellate justices in which they asserted that a certain defendant who had assigned counsel was given the finest defense. From my experience, I do not see how a judge can tell whether a man had a good defense, because what goes on in court possibly represents only 50 per cent of the actual work done in the preparation of a trial. The investigation, the running down of sources of information, sometimes demands that you go beyond the . . . knowledge of the defendant in gathering this information. Unless this was done a cross-examination, however vigorous, would never bring out information that might be revealed upon proper investigation.³⁴³

As we have already seen (in connection with "involuntary" confessions and illegal search and seizure), the singularly pernicious thing about the *Betts* rule is that the more "advances" achieved in criminal law and procedure, the more "rights" and "powers" theoretically available, the wider grows the gap between those who can afford a lawyer and those who cannot.

Let's take still another example. Of what comfort is it to the untrained, uncounselled defendant, who probably never heard of "criminal discovery" that,

Within the last three years alone, there have been five state appellate decisions recognizing or ordering discovery in a criminal case for the first time. Subjects made available through discovery have included confessions, guns and bullets, bloodstained clothing, reports of scientific analyses, autopsies, and photographs of places and of persons.³⁴⁴

³⁴¹ Shortly after the beating, the old man for whose murder Manceri was prosecuted came out of the park and staggered into a nearby gas station. "All he could get out," according to the owner of the station, "was 'two—two.'" *Id.* at 4. Furthermore, after the trial the press reported that the old man had indicated to four people that two persons had attacked him. (The prosecution claimed it knew nothing about this, and two of the four later claimed they were misquoted.) *Id.* at 28. If Manceri's lawyer possessed any of this information before the trial, he had ample reason to think that if the old man had made any statements to the police, they would conflict with Dorothy's version.

³⁴² Wright, *Duties of a Prosecutor*, 33 CONN. B.J. 293, 294-95 (1959).

³⁴³ Quoted in Trebach, *The Criminal Process and Legal Aid in New Jersey*, 1958, pp. 139-40 (unpublished thesis in Firestone Library, Princeton, N.J.), in turn quoted in Note, 107 U. PA. L. REV. 812, 828 (1959).

³⁴⁴ Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 297 (1960). It is interesting to note that of the few jurisdictions with statutes or rules providing for liberal criminal discovery comparable to FED. R. CRIM. P. 16, 17(c), three are states that do not furnish counsel as of right to indigent felony defendants. See DEL. SUPER. CT. (CRIM.) R. 16, 17(c) (1952); FLA. STAT. § 909.18 (1961); MD. RULES P. 728 (1961).

Reports of scientific analyses and autopsies are worth dwelling on for a moment:

Frequently, crucial evidence may be in the form of expert testimony from persons who have analyzed blood or other material or from a doctor who has performed an autopsy. It is only natural that defense counsel would wish discovery of the reports rendered by these persons since as a practical matter the defendant, and especially the indigent defendant, lacks the means to get such information for himself. Where the defendant is kept in custody for hours and even days after the event and thus has no ability, much less acumen, to obtain this type of evidence, denial of discovery effectively separates him from this type of information until the moment it is introduced in trial.³⁴⁵

The uncounselled indigent not only lacks the means to gather such information himself, but he also lacks the know-how to get it from somebody else who has already done the gathering. Here, again, as criminal discovery becomes increasingly available the man rich enough to hire his own lawyer grows "richer"; the man fortunate enough to have counsel assigned him is blessed with more good fortune, and the uncounselled indigent stays in his rut. The progress of the law just passes him by.

II: Aren't you exaggerating a good deal? The great bulk of courts are still withholding "criminal discovery."³⁴⁶

Δ: True, but "practice in the criminal courts is largely improvised;"³⁴⁷ it is not uncommon for the court to "suggest" that autopsies, reports and other data be turned over to the defense attorney as a favor, if not a right.³⁴⁸ Furthermore, "often district attorneys are willing to open up their files for inspection by defendant's *counsel*, when the latter is considered trustworthy in the sense that he would not be a party to subornation of perjury or an illegally fabricated defense."³⁴⁹

³⁴⁵ Fletcher, *supra* note 344, at 307.

³⁴⁶ See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1180-85 (1960), and authorities collected therein.

³⁴⁷ Levy, *Some Comments on the Trial of a Criminal Case*, in 2 MANUAL FOR PROSECUTING ATTORNEYS 675 (Ploscowe ed. 1956). "I had a murder case a few years ago in which it was important for the defense to know the results of blood tests on the defendant's clothes. I asked the assistant district attorney to show me the serological report. He said that he did not think he had authority to do so.

"I thereupon made a motion to compel him to show me the report. The judge called me up to the bench. 'I think you ought to have it,' he said, 'but I don't want to create a precedent. We'd be pestered to death by all sorts of motions if we started this sort of thing. Why don't you withdraw your motion and I'll ask the district attorney to give it to you.'

"I withdrew my motion and I got the report. It was very helpful. It is evident from this episode that practice in the criminal courts is largely improvised. These preliminary applications are not reviewable, and pre-trial assistance is sometimes granted as a favor when it should always be granted as a right." *Ibid.*

³⁴⁸ *Ibid.*

³⁴⁹ Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56, 99 (1961). True, Professor Louisell elsewhere advances a "skeptical inquiry" as to whether this

Perhaps I can reach you another way. Recently, a distinguished defense attorney was asked: "If you had to pick out one problem of chief difficulty in the defense of a person charged with crime, what would it be?" His answer:

It is the defense lawyer's difficulty in getting information. . . . When a defendant comes in and tells a story, it will often be apparent that an investigation is in order. Records may be needed; access to witnesses may be important. Consider the problem of getting information by supposing the defense would be aided by a look at some sales slips from Macy's department store. If the defense lawyer were to call Macy's and ask to see some sales slips, he would, in all probability, be politely turned away. The prosecution, however, merely has to call Macy's and . . . almost certainly [he] will get them. It is "respectable" to co-operate with the prosecution. In contrast, it is "getting involved" when one co-operates with the defense. Similarly, when a defense lawyer goes out to interview witnesses he will find that the witnesses won't want to get "involved" with the defendant. It is much easier for the prosecution to persuade witnesses to sign statements.³⁵⁰

What should the *uncounselled indigent* say?

A recent comprehensive and intensive New York City bail study—and there is good reason to think that these findings hold for urban areas generally³⁵¹—reveals that:

The deficiencies of the bail system operate to deprive half of all felony defendants of their pre-trial freedom, and that as many as three-fourths of those accused of some of our important crimes like burglary are jailed pending trial. . . . Indeed, the most ironic finding in the whole study is the revelation that accused persons, whom our law presumes to be innocent and who are not to be punished, are confined pending trial under conditions which are more oppressive and restrictive than those applied to convicted and sentenced felons. . . . The fact that the New York study found that even for those for whom bail was set at the purely nominal figure of \$500 [bond premium: \$25] the result was pre-trial imprisonment in twenty-eight percent of the cases bears eloquent testimony to the existence

is done "most typically in cases where it is believed that showing the information will induce a plea of guilty." *Id.* at 59 n.6. As has already been pointed out, however (see note 122 *supra*, and accompanying text), most criminal prosecutions are disposed of by guilty pleas. The defense attorney afforded access to the prosecutor's files can much more intelligently weigh the likelihood of conviction against the results he thinks he can achieve by a guilty plea. How well informed is the uncounselled indigent when he makes his decision to plead guilty or stand trial?

³⁵⁰ Steinberg & Paulsen, *A Conversation with Defense Counsel on Problems of a Criminal Defense*, 7 PRAC. LAW. 25, 26-27 (1961).

³⁵¹ See BEELEY, *THE BAIL SYSTEM IN CHICAGO* 31-34, 155, 157-59 (1927); ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 112, 129-31 (1947); PUTTKAMER, *ADMINISTRATION OF CRIMINAL LAW* 103, 105 n.26 (1953); SUTHERLAND & CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 359-60 (6th ed. 1960); Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1035-36, 1045, 1048-49, 1070-71, 1076 (1954).

of a hard core of defendants who can offer no reasonable financial security whatsoever.³⁵²

Surely, I need not labor the point that most indigent defendants will be in detention jails, awaiting disposition of their cases;³⁵³ not only will they be

³⁵² Foote, Foreword: *Comment on the New York Bail Study*, 106 U. PA. L. REV. 685, 688-90 (1958). "A study of cases in the Southern District of New York [apparently the work of a committee recently appointed by the Attorney General and headed by Professor Francis Allen] indicates that over one-third of those required to post bail of \$500 or less could not do so. When the bail was set between \$500 and \$1500, over half were unable to post it." Kennedy, *Judicial Administration: Fair and Equal Treatment to All Before the Law*, 28 VITAL SPEECHES 706, 707 (1962). "Last year, a total of 118,000 men and women were in detention jails in New York, awaiting trial or disposition of their cases, largely because they could not 'make bail'; by contrast, there were 46,000 sentenced persons. . . . In the Brooklyn House of Detention for Men—actually a maximum-security jail for adolescents between 16 and 21 years of age—the average time behind bars without trial was forty-five days." Samuels, *Bail: Justice for Far from All*, N.Y. Times, Aug. 19, 1962, § 6 (Magazine), p. 13.

³⁵³ The determination of indigency is a difficult issue, one usually resolved without the aid of specific standards or definite limits. See, e.g., Willcox & Bloustein, *Account of a Field Study in a Rural Area of the Representation of Indigents Accused of Crime*, 59 COLUM. L. REV. 551, 565-66 (1959) (upstate New York); Note, *Legal Aid to Indigent Criminal Defendants in Philadelphia and New Jersey*, 107 U. PA. L. REV. 812, 832-33 (1959); Note, *Representation of Indigents in California—A Field Study of the Public Defender and Assigned Counsel Systems*, 13 STAN. L. REV. 522, 545-48 (1961). In a 1957 unpublished study of indigent defendants in Kansas, Michigan and Wisconsin, for the American Bar Foundation pilot project on the administration of criminal justice in the United States, Professor Arthur H. Sherry concluded that generally the issue of "indigency" is treated, informally, haphazardly and perfunctorily.

The fact that an accused is able to afford bail raises the inference that he is capable of retaining counsel, but this does not necessarily follow. Friends or relatives may furnish money for the bail bond premium, but be unwilling or unable to pay for a lawyer. Or the defendant himself may be able to afford small or "nominal" bail which he is fortunate enough to be granted (in some California counties "the increase of indigents on bail may be explained by the fact that bail bond premiums and court bail schedules have recently been lowered," Note, STAN. L. REV., *supra*, at 545 n.155), but nevertheless unable to hire a lawyer, whose fee, particularly in the case of jury trials, may well be over a thousand dollars. Or an accused with minimum cash resources may be able to afford *either* bail *or* an attorney and, arguably, "should not be made to choose between freedom pending trial and representation by counsel during the trial." Note, U. PA. L. REV., *supra*, at 833.

In part because "if bail cases were handled, a much more extensive investigation into the matter of the defendant's indigency would be required than is presently pursued . . ." the Defender Association of Philadelphia only furnishes representation in the so-called "prison cases." *Id.* at 843-44. According to the Philadelphia Defender, this practice is "not broad enough to meet the over-all demands for defender services." Pollock, *Equal Justice in Practice*, 45 MINN. L. REV. 737, 751 (1961). When a Philadelphia defendant out on bail nevertheless manages to persuade the court that he is financially unable to hire private counsel, the court will revert to the appointed counsel system. Note, U. PA. L. REV., *supra*, at 844. In a few New Jersey counties posting bail "will usually preclude assignment of counsel," but elsewhere in the state the policy is to consider the circumstances behind the production of bail. *Id.* at 832. In California the ability to raise bail is not decisive but "a few courts have been especially reluctant to give an accused on bail free legal services; thus, prior to appointing counsel they have raised the amount of bail to insure his confinement." Note, STAN. L. REV., *supra*, 545. Generally, "courts in public defender counties tend to resolve doubtful cases [of indigency] in favor of appointment, while assigned counsel counties tend to maintain stricter standards." *Id.* at 547.

unable to pour any money into the search for evidence, but, however ill-equipped they are to do so, they will also be unable to throw themselves into the search.

II: Is the "financial ability" of the defendant³⁵⁴ no longer a relevant guiding standard for setting bail?

Δ: Theoretically it is, now as always. But how does it work out in practice? Typically, "the individual is subordinated to the class into which he is placed according to the type of crime with which he is charged, although what relationship to the risk of non-appearance this may have is unknown."³⁵⁵ Indeed, one careful study disclosed that "evidence of the crime is the only information which the magistrate possesses in two-thirds of the cases."³⁵⁶

Because he is penned up, awaiting disposition of his case, the indigent defendant needs a lawyer more desperately than the man who can afford one. The jailed indigent defendant cannot seek out evidence or persuade potential witnesses in his behalf to testify either to his innocence or in mitigation of penalty. Even his communication with the outside world is greatly curtailed.³⁵⁷

What about that rare indigent defendant, the one fortunate enough to be walking the streets pending disposition of his case? How much is he likely to turn up?

If people are even reluctant to "get involved" with defense counsel, how will they feel about getting involved with the defendant himself? If a department store will frequently turn away defense counsel, what are the odds that it will co-operate with defendant-in-person? In any event, does an indigent layman know any more about, say, interview technique than he does about, say, cross-examination? Does he even know *what* he is looking for and *why*?

F. *The Singularly Frustrating Thing About the Betts Rule*

Δ: The failure of the unrepresented defendant to develop a satisfactory theory, or if he does, to support it with adequate evidence, hardly demonstrates that he had a "fair trial." The same may be said for the failure to discard an alibi defense or some other defense which is likely to do more harm than good. For the failure to know the "law" or possess the "facts" are not abnormal or improbable consequences of being without the aid of counsel inside and outside the courtroom. The frustrating thing about the *Betts* rule is that the likely adverse consequences of deprivation of counsel serve as justification for the deprivation.

³⁵⁴ See, e.g., FED. R. CRIM. P. 46(c).

³⁵⁵ Note, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1043 (1954). That this practice is widespread may be seen from a study of the authorities cited in note 351 *supra*.

³⁵⁶ Note, 102 U. PA. L. REV., *supra* note 351, at 1038.

³⁵⁷ *Id.* at 1054-58.

After his conviction, the indigent remains caught in the same vicious circle. As a practical matter, statutes requiring the perfection of an appeal within a relatively short time after conviction close the regular avenues of review to him.³⁵⁸ His only real hope is habeas corpus, coram nobis or some other extraordinary writ; "the remedy is at the discretion of the states, and their procedure must generally be followed."³⁵⁹ If he continues to protest his innocence he is likely to continue to do so alone. He must "prove by his own wits that he lacked the wit to stand trial without counsel initially."³⁶⁰

A recent study, compiled in the Office of the Clerk of the Supreme Court, shows that "an attorney of record appeared in only eight percent of the cases of collateral attack originating in a state court" and that "there was something in the nature of a record, the adequacy of which was not checked, in only 18 percent of these cases."³⁶¹ These findings should come as no surprise. A decade ago, Mr. Justice Frankfurter observed that "these petitions . . . are rarely drawn by lawyers; some are almost unintelligible and certainly do not present a clear statement of issues necessary for our understanding, in view of the pressure of the Court's work" and "the number of cases in which most of the papers necessary to prove what happened in the State proceedings are not filed is striking."³⁶²

What if somehow, someday, the state prisoner manages to prevail against overwhelming odds? Why, he could find himself standing trial a second time, still without counsel. "The cat-and-mouse game could take place again."³⁶³

To tell the indigent that he must demonstrate later—without the guiding hand of counsel—that he was prejudiced earlier—without the guiding hand of counsel—makes about as much sense as telling the victim of legislative malapportionment that he can find relief at the polls against the favored constituents who—because of the malapportionment—are sure to prevent correction of the matter at the polls.

If prior to *Baker v. Carr*³⁶⁴ the legislative policy in some states "riveted the present seats in the assembly to their respective constituencies,"³⁶⁵ then, after *Betts* the indigent defendant in some states—without funds to hire a lawyer

³⁵⁸ BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 132-33 (1955); Note, 97 U. PA. L. REV. 855, 861 (1949).

³⁵⁹ *Ibid.*

³⁶⁰ Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 494 (1960).

³⁶¹ *Id.* at 475, describing the findings of an unpublished study of the 1956, 1957 and part of the 1958 Terms of the Supreme Court made by Michael Rodak, Jr., Assistant Clerk of the Court, and Joseph F. Spandiol, Jr., of the Administrative Office of the United States Courts.

³⁶² *Brown v. Allen*, 344 U.S. 443, 493 (1953) (separate opinion).

³⁶³ BEANEY, *op. cit. supra* note 358, at 185.

³⁶⁴ 369 U.S. 186 (1962).

³⁶⁵ *Id.* at 259 (Clark, J., concurring).

in the second place (appeal), or the third place (state collateral attack), or the fourth place (federal collateral attack), to show why he needed the lawyer he couldn't afford in the first place—is riveted to a cross of poverty.

APPENDIX I

This appendix consists of extracts from correspondence with prosecuting attorneys and/or the attorney general's office in jurisdictions whose statutes or rules do not provide for assigned counsel as of right in all felony cases, and sets forth their comments on the *practice* in their jurisdictions.³⁶⁶

ALABAMA: Letter from Carl M. Booth, Circuit Solicitor, 13th Jud. Cir. (Mobile), June 6, 1962: "The practice in Alabama is no counsel are appointed except in capital felonies." Letter from Louis P. Moore, Circuit Solicitor, 24th Jud. Cir. (Fayette), June 12, 1962: "In practice, in our three-county circuit, counsel is not appointed in non-capital felonies. The court does frequently request counsel present in the courtroom to assist an indigent defendant in striking a jury and this has often led to counsel gratuitously representing such indigent defendant." Letter from Frank W. Riggs, III, Deputy Solicitor, 15th Jud. Cir. (Montgomery), June 12, 1962: "[Under existing state law] our Circuit Judge does not feel that he can 'appoint' counsel in non-capital felony cases. However, I have never known him to fail to request an attorney to counsel with an indigent defendant when the circumstances warranted it. In this respect, there is no distinction between 'major' and 'minor' felonies. . . . [W]e have had a number of cases in which defendants have waited until the case was called for trial before requesting appointment of counsel. It has been my experience that, even in these cases, the Judge requests some attorney who is present in the courtroom to go into a witness room with the defendant and counsel with him." Letter from Fred W. Nicol, Circuit Solicitor, 6th Jud. Cir. (Tuscaloosa), June 11, 1962: "Our judges, upon request, appoint counsel in non-capital cases. In capital cases appointment of counsel is mandatory for indigents. Our local bar is cooperative. . . . Counsel appointments are usually made at arraignment."

DELAWARE: Letter from Max S. Bell, Jr., former Deputy Attorney General, June 11, 1962: "The practice in Superior Court is to appoint an attorney for every person accused of a felony, if he would like such assistance. I believe that unrepresented felony defendants are always asked about this upon arraignment, whether they plead guilty or not. If a defendant is about to plead guilty, the plea of guilty may be held up, or an attorney may be appointed even after entry of the guilty plea. In addition, an attorney will occasionally be appointed for a person accused of a misdemeanor, if there are unusual circumstances present, such as a question of sanity, or if a severe penalty is in the offing, such as in some drug cases. Pursuant to a procedure initiated in the Attorney General's office, most incarcerated and unrepresented defendants are informally asked immediately after indictment (or after an information is filed, if indictment is waived) if they want an attorney appointed, and many appointments can thereby be made before arraignment." E. Norman Veasey, present Deputy Attorney General and, like Mr. Bell, a member of a recently appointed Committee of the Superior Court of Delaware now studying existing and proposed rules for appointment of counsel,³⁶⁷ was sent a copy of Mr. Bell's letter

³⁶⁶ See note 82 *supra*.

³⁶⁷ See note 78 *supra*.

and concurs in his description of current Delaware practice. Letter from Mr. Veasey, June 28, 1962.

FLORIDA: Letter from Reeves Bowen, Assistant Attorney General, June 13, 1962: "[T]he practice has long prevailed in this state for trial judges to appoint counsel for indigent defendants in the more serious and the more complicated cases. . . . Moreover, some judges appoint counsel in *any* felony case in which an indigent pleads not guilty and requests that counsel be furnished him. . . . In the few counties which have public defenders under the authorization of local laws, there is, of course, never any need for the judge to appoint counsel." Letter from Richard E. Gerstein, State Attorney, Dade County (Miami), June 11, 1962: "Dade County, which is the largest county in the State, has authority, by legislation applying to this county only, to employ a Public Defender. The Defender acts as counsel for all indigent felony defendants who are in jail and unable to make bond. The trial court may direct the Public Defender to represent indigent defendants who are unable to make bond in misdemeanor cases. [He] also represents all defendants who are minors and in jail, unable to make bond in felony and misdemeanor cases. The Defender enters the case at or before arraignment." Letter from Thomas M. Coker, Jr., County Solicitor, Broward County (Fort Lauderdale), June 15, 1962: "[W]e were the first in the state to institute a public defender system. We now have two lawyers paid by the county to act in this capacity. They represent all indigent felons. They are also called upon occasionally by the court to represent indigent high misdemeanants. . . . [I]n our court, *i.e.*, the Court of Record, all indigent felons are conferred with prior to their arraignment. Our judges will not allow them to be arraigned until they have seen the public defender." Letter from Paul B. Johnson, State Attorney, 13th Jud. Cir. (Tampa), June 19, 1962: "The Public Defender in Hillsborough County (Tampa) as a matter of policy represents only those persons who have pled not guilty and are incarcerated in the county jail awaiting trial and are unable to furnish counsel or bail bond. . . . When a defendant can obtain a bail bond we do not consider him to be indigent." Letter from Edward M. Booth, County Solicitor, Duval County (Jacksonville), June 12, 1962: "The procedure for appointment of counsel in felony cases in Florida is not standardized and much is left to the discretion of the local judges. I can only speak for the practice here in Duval County . . . one of the larger counties in the state of Florida. We have a procedure for appointment of counsel in all felony cases where the defendant is adjudged to be insolvent by the trial court. . . . This indigent rule has been applied where the defendant is in jail and unable to post bond but does not apply to those individuals who are on bond. . . . As a matter of practice we consider any felony a major and serious charge and it is our practice to appoint counsel in order for the defendant to have an opportunity to confer with his counsel prior to arraignment, or if the defendant has already been arraigned, to allow him to withdraw any plea that he may have entered if his counsel so advises." Letter from Warren H. Edwards, former County Solicitor, Orange County (Orlando), June 18, 1962: "A week before a term of court opens . . . all defendants, who are in the County Jail, and are to be tried that term, are brought into Court and questioned by the Judge as to whether or not they have counsel. If not, the defendant is then questioned as to his desire for counsel and his ability to pay for same, if one is wanted. If the defendant pleads indigency, he is required to sign an affidavit to that effect. At this point, a representative of the County Bar

Association notes the defendant's name and the crime with which he is charged. An attorney is then appointed by the Bar Association from a list of volunteers. . . . The above procedure is carried out for felonies and misdemeanors."

HAWAII: Letter from Yoshito Tanaka, County Attorney, County of Hawaii (Hilo), June 12, 1962: "At the time of the arraignment the court will inquire whether the defendant is represented by counsel. Furthermore, if defendant states that he has no money to retain counsel, the court will further inquire whether he wants to be represented by counsel. If defendant says that he wants counsel and he can satisfy the court that he is an indigent defendant, the court will appoint a counsel for the defendant at that point before the indictment is read." Letter from John H. Peters, Prosecuting Attorney, City and County of Honolulu, Oct. 1, 1962: "Generally speaking in *any* felony case pending in the *circuit* court, or appeal therein, a defendant may before plea or anytime thereafter ask the circuit court judge to appoint an attorney to defend him. The practical aspect of this motion is that the defendant makes an affidavit that he is without means or resources to obtain counsel. The court then instructs the Adult Probation Office to probe the economic and financial status of the defendant. . . . Upon written report by the Adult Probation Office that defendant is without means or resources, the court then appoints an attorney for the defendant. As a practical matter, in every case where a defendant appears in the circuit court for arraignment and plea without an attorney, the circuit court judge automatically asks defendant if he desires the services of a court-appointed attorney. Although we have not had a situation where defendant has refused the services of an attorney appointed by the court, several years ago in a first degree murder case, the defendant refused to be represented by counsel but an attorney was appointed upon the court's own motion. This situation may be qualified by the fact that at that time the death penalty was in effect. The situation might be different today since the State of Hawaii has abolished capital punishment."

MAINE: Letter from George C. West, Deputy Attorney General, June 14, 1962: "From a practical point of view our Superior Court assigns counsel in all felony cases where the defendant says he is indigent. Usually this assignment of counsel is made after indictment and the arraignment is postponed to allow the defendant to confer with his assigned counsel. . . . I think I can truthfully state that it would be a highly unusual and extremely rare instance when a defendant accused of a felony does not have counsel at every stage of court proceedings against him. There may be instances at the municipal court level where the court may only find probable cause, that the defendant may not have counsel." Letter from Gaston M. Dumais, Androscoggin County Attorney, June 13, 1962: "[C]ounsel is appointed in all felony cases if he is indigent. . . . We are becoming more and more liberal on this subject due to Coram Nobis which has alerted the courts on the rights of defendants. It does not matter whether the defendant wants to plead guilty or not guilty. If he wants an attorney, and he is indigent he is given counsel." Letter from Ian MacInnes, Penobscot County Attorney, June 13, 1962: "The practice in this county is to appoint counsel for indigent defendants in *all* felony cases . . . at least seventy-five percent of the appointments are made tentatively at the Municipal Court level . . . and the same counsel is the one formally appointed when the case appears in Superior Court. . . . I believe that this procedure is followed in the entire state." Letter from Arthur Chapman, Jr., Cumberland County Attorney, June 12, 1962: "Because

of possible future repercussions . . . I think that it is fair to say that in our state, a defendant is never even arraigned without counsel on an indictment [or information] charging a felony, if he has indicated that he desires counsel and fully proves indigency." Letter from Marcel R. Viger, former York County Attorney, June 9, 1962: "In this county, and I believe it to be the practice in the State, as we have travelling superior court justices, any indigent person indicted by the grand jury on any felony charge will have counsel appointed by the Court. . . . As soon as the grand jury rises with indictments, counsel are appointed and no plea is accepted until such time as the indigent has an opportunity to discuss the matter with his counsel."

MARYLAND: Letter from Saul A. Harris, State's Attorney, Baltimore City, June 20, 1962: "As a matter of practice, our judges often appoint counsel where such appointment is not required under the rules, especially in cases involving youthful offenders and offenders who appear intellectually or mentally deficient to the court at the time of the arraignment. . . . [I]n many instances, because of the complexity of the case, rather than the seriousness of the charge, an attorney is appointed even though the rules do not so require. . . . [As] a matter of practice in the Criminal Courts of Baltimore City, in most cases where an *indigent* defendant requests a court-appointed attorney, he is rarely refused unless the charge is a very minor one such as disorderly conduct or disturbing the peace."

MISSISSIPPI: Letter from Bill Waller, District Attorney, 7th Cir. Ct. Dist. (Jackson), June 13, 1962: "Insofar as I know, in this state no organized voluntary effort has been made to provide counsel except that provided for in cases where the defendants are charged with capital crimes. . . . The 'practice' is not to provide other defendants with any representation whatsoever. However, prosecutors and the Courts are especially careful to inquire into the circumstances of the indigent defendant . . . and more often than not, first offenders are placed on probation on motion of the District Attorney. On infrequent occasions where some question as to the 'mental competence' of the defendant is apparent, the Court will ask some attorney, as a favor to the Court, to inquire into the mental question, and on many, many occasions, such type defendants, whether represented or not, are referred to our state hospital for psychiatric diagnosis." Letter from Parham H. Williams, Jr., 4th Cir. Ct. Dist., July 12, 1962: "As District Attorney, I am responsible for criminal prosecutions in the following five Counties: Holmes, Humphreys, Leflore, Sunflower and Washington. In the Courts of these Counties it is not and has not been the practice to appoint counsel for indigent defendants in non-capital cases, regardless of the seriousness of the felony. However, there is an exception to this in cases wherein the indigent defendant is under the age of 18. In these cases, the Court generally, but not always, requests a member of the local bar to counsel and advise the minor defendant prior to his pleading." Letter from James Finch, District Attorney, 12th Jud. Dist. (Hattiesburg), June 13, 1962: "It is the practice in this district in all felony cases, non-capital, where the accused is financially unable to employ counsel . . . for members of the bar to voluntarily represent such persons without compensation by request of the Court or by my office. . . . There have been instances where my office requested defense counsel to advise with the accused, and I know of no cases in the more than twenty years I have been engaged in the practice of law where

an accused has been denied legal counsel because of his poverty if he requests an attorney."

NORTH CAROLINA: Letter from Ralph Moody, Assistant Attorney General, June 11, 1962: "In felonies other than capital we do not make any provision at all nor do we have any test as to serious or major felonies. . . . Some of our trial judges appoint counsel in all felonies other than capital; others appoint counsel if defendant requests same, but there does not seem to be any general policy." Letter from Hubert E. May, Solicitor, 2d Solic. Dist. (Nashville), June 11, 1962: "Candor compels me to say that not every indigent defendant is provided with counsel, but it is the custom in the Superior Courts of our State for a Judge to appoint counsel to represent any defendant when in his opinion and in his discretion he thinks the appointment of such counsel is necessary to the proper protection of the rights of the defendant and the administration of justice." Letter from Harvey A. Lupton, Solicitor, 11th Solic. Dist. (Winston-Salem), July 7, 1962: "The courts rarely ever appoint counsel in traffic cases and rarely deny a request by defendants for appointment of counsel in felony cases. The court appoints counsel before the trial begins and always allows counsel time within which to prepare the case. In those cases in which the defendant does not have counsel, the Judge takes great caution to insure a fair trial."

NEW HAMPSHIRE: Letter from William Maynard, Attorney General, June 12, 1962: "It is my experience that when persons charged with felonies are arraigned they are invariably advised of their right to counsel and that counsel is appointed for them when it is appropriate to do so, and that usually counsel of the respondent's own choosing is assigned and that counsel enters the case prior to the taking of a plea." Letter from Arthur Olson, Jr., June 11, 1962: "In 5½ years that I served as prosecutor and this involved more than 500 criminal actions, I do not think there were more than two or three defendants who appeared without counsel and those that did so, did it because they desired to plead in their own behalf." Letter from James J. Burns, former Coos County Attorney, June 14, 1962: "As a practical matter . . . anyone in this state who is charged with a crime which carries as a maximum penalty the imposition of a sentence of more than one year is entitled to court-appointed counsel. . . . Before any felony defendant enters a plea in Superior Court, our presiding judge always advises him that he is entitled to counsel, that his counsel fees will be paid by the county and in effect gives him every opportunity to be represented. Therefore, in view of the practice that has developed in the appointment of counsel, no one has ever felt that it was necessary to broaden the scope of our statutory provisions."

PENNSYLVANIA: Letter from Paul M. Chalfin, First Assistant District Attorney, Philadelphia, June 7, 1962: "[T]he practice in Philadelphia practically insures that all indigent defendants in all criminal cases will be represented by the Voluntary Defender Association. . . . It represents defendants who are awaiting trial in person and who have not been able to post bail. . . . This practice works admirably well in Philadelphia. . . . In murder cases, counsel is appointed following indictment. In a non-murder case, the Voluntary Defender interviews the defendant in prison shortly after he is held by a Magistrate following a preliminary hearing. His appearance is usually entered at arraignment prior to trial." Letter from Samuel Strauss, As-

sistant District Attorney, Allegheny County (Pittsburgh), June 4, 1962: "Our practice in this County in the light of recent federal decisions has been to play it on the cautious side. On arraignments, our prisoners are asked how they wish to plead and whether or not they have counsel of their own choice. If they are indigent and wish counsel, particularly in all cases where a trial is involved, we furnish counsel for them through the Legal Aid Society of this community. In fact, if they stand trial on a felony charge we insist that counsel sit at the table even if the accused does not want counsel. We will go even further. Where he pleads guilty, in most felony cases we still provide counsel . . . at the time of plea." Letter from Joseph J. Cimino, District Attorney, Lackawanna County (Scranton), June 8, 1962: "[O]ur courts appoint counsel in murder cases under statute. In all other major cases, when a defendant requests or requires counsel the court designates counsel from the members of our bar. Generally, in misdemeanors, the practice is that we in the District Attorney's Office solicit and procure from our bar the services of counsel for the defendant. Therefore, except in murder cases, as a matter of practice, but not under statute or court rule, we do solicit and procure counsel." Letter from Paul A. McGinley, former District Attorney, Lehigh County (Allentown), June 8, 1962: "In this county, which I think is typical of most, upon a defendant indicating that he would like to plead guilty to the charges, the District Attorney requests the court to appoint counsel, where he is not already represented, in *all* felony cases. . . . [I]n serious misdemeanor cases, such as involuntary manslaughter, the court also invariably appoints counsel. If the defendant not being represented by counsel desires to go to trial, then an attorney is appointed to represent him and the case is pushed off. . . . Under a recent arrangement set up by our Bar Association, lawyers have been appointed to be available in all sessions of criminal court. These lawyers are paid with money appropriated by the Bar Association." Letter from Martin H. Lock, District Attorney, Dauphin County (Harrisburg), June 7, 1962: "Here it has been my practice to make certain that there be legal representation provided any defendant in a criminal case who is charged with a crime, either felony or misdemeanor, which calls for either a sentence to the penitentiary or to any other state penal institution, or in which the defendant might be placed under the supervision of the State Parole Board. I have had the good cooperation of the Court [and] . . . also excellent cooperation from the members of our Bar, who willingly come forward when requested to do so. . . . [S]uch appointment is made usually after a true bill of indictment has been returned." Letter from Stephen A. Teller, District Attorney, Luzerne County (Wilkes-Barre), June 7, 1962: "It makes no difference whether the crime with which the defendant stands charged is a minor misdemeanor or a major felony. If the defendant does not request appointment of counsel, no counsel is appointed for him; but if the defendant requests the Court to appoint counsel, the Court appoints counsel for him. . . . It makes no difference whether the defendant is in or out of jail, on bail or in default of bail, so long as the defendant appears to be indigent." Letter from R. Lee Ziegler, District Attorney, Mifflin County (Lewis-town), June 7, 1962: "As a practical matter our Court is very lenient in making appointments in both misdemeanor and felony cases. Since the word has circulated that the Court is willing to appoint counsel, defendants charged with minor offenses frequently request counsel. In the absence of requests for counsel, the Court sentences many unrepresented persons to *County Jail* without suggesting the right of

counsel. Where it appears from the nature of the charge or from the Court's knowledge of a defendant's record that defendant may be sentenced to a *penitentiary*, the Court insists upon the appointment of counsel. This precaution is taken by the Court as a safeguard against Writs drafted in penitentiary libraries to effect release by reason of lack of counsel. . . . The practice does not differ from 'serious' to 'major' felonies or misdemeanors except . . . the Court insists upon appointing counsel when penitentiary time appears imminent. . . . Many appointments are made when defendants voluntarily appear or are brought to Court by the Sheriff in response to the District Attorney's letters inviting guilty pleas. . . . In recent months some defendants have informed the Sheriff that they desired counsel. In such cases, the defendants were brought before the Court for the appointment." (Emphasis added.)

RHODE ISLAND: Letter from Francis J. Fazzano, Assistant Attorney General, July 5, 1962: "Please be advised that there is by statute in Rhode Island, an office of the Public Defender, which office, by law, represents all defendants in the Superior Court who can satisfy the court, by affidavit, that they cannot afford to retain private counsel . . . I must differ with the citation contained in your case [McNeal v. Culver, 365 U.S. 109, 122 (1961)] to the effect that Rhode Island does not make provision for the appointment of counsel in all felony cases." Letter from Yale Kamisar to Fazzano, July 27, 1962: "Gen. Laws of Rhode Island, § 12-15-3 . . . authorizes the public defender to act as attorney for indigent defendants 'in those criminal cases referred to him by the superior courts.' (Emphasis added.) This statute does not say, in and of itself, that *all* defendants in superior courts who satisfy the courts that they are indigents will automatically obtain the aid of the public defender, and I am unable to find any other statute which does. . . ." Letter from Fazzano, July 30, 1962: "I can assure you that it is the unanimous feeling of all of the members of our Supreme and Superior Courts that our statute is intended to provide that any defendant in a felony case who asks for the services of the Public Defender will be furnished with such services provided he can satisfy the Court that he is indigent and we are aware of no rule of the Court to the contrary." Phone conversation with Paul E. Kelley, Assistant Public Defender, Sept. 6, 1962: "I agree with Mr. Fazzano's description of Rhode Island practice. . . . Our judges practically talk the defendant into taking counsel. If he refuses at first, they invite him, again and again, to reconsider, by asking him such questions as: 'Do you realize the importance of counsel?' 'Are you sure you don't want a lawyer?'" Letter from Mr. Kelley, Sept. 19, 1962: "A regular procedure has been set up for handling indigent defendants. We have forms at the prison which the indigent defendants fill out and mail directly to the Superior Court. These forms are approved by a Justice of the Superior Court and forwarded to our office. We are assigned to the defendant in the great majority of cases before the indictment is returned. We also receive cases directly from the court where the defendant hasn't requested a public defender until he be actually brought into court. A defendant appearing without counsel is advised of the desirability and need of counsel. It is only after a thorough explanation that he is permitted to represent himself. We do not handle preliminary hearings in the district courts."

SOUTH CAROLINA: Letter from Randolph Murdough, Solicitor, 14th Jud. Dist., June 19, 1962: "There is no definite practice concerning the appointment of attorneys to represent defendants in felony cases, other than capital cases. . . . Some of our judges appoint counsel in [non-capital] felony cases, some do not. There is no

definite thought along this line although I am of the opinion that the judges now are appointing attorneys more and more in felony cases. Very seldom is counsel appointed when a felon pleads guilty. Generally speaking, when a person charged with a felony asks that counsel be appointed most of the judges do appoint one, but when they do not say anything about it an attorney is not appointed." Letter from H. Wayne Unger, Colleton County Attorney, June 14, 1962: "In this State the Judges preside by Circuits and rotate all over the State. I have never in twenty-five years of practice seen anyone tried for a crime carrying a penalty greater than five years without the Judge appointing counsel. As a matter of practice these appointments usually result from murder, rape, assault and battery with intent to kill, manslaughter, burglary and grand larceny. Incidentally, members of the Bar are appointed without compensation since there is no public defender and no provision in this state for the appointment of Court-appointed counsel. I myself have served many, many times." Letter from James P. Nickles, Abbeville County Attorney, July 24, 1962: "Ordinarily, when a defendant is arraigned on one of the serious charges, before he enters a plea he will be asked by the court if he has counsel, and if he has not the court will appoint counsel to represent him. Then the judge almost always continues the case to the next term of court in order to give the defendant a chance to prepare his case."

VERMONT: Letter from Charles E. Gibson, Jr., Deputy Attorney General, former State's Attorney and former Judge of Municipal Court, Caledonia County, Aug. 31, 1962: "[T]he courts in Vermont, as a matter of practice, have always treated the indigent defendant as if he had a right to have counsel assigned to him at the expense of the State. The courts always advise a defendant that he has such a right and, unless he absolutely refuses to have counsel, assign one to him. As a matter of fact, I think the courts assign counsel to an indigent even if he doesn't want one. In my opinion, the Vermont Supreme Court would now say that an indigent respondent has the right to have counsel assigned him at the expense of the State. I think the court would say that if the record is clear that the defendant is indigent, that the lower court abused its discretion in not assigning counsel." Letter from Ernest W. Gibson, III, State's Attorney, Windham County, Aug. 30, 1962: "In actual practice . . . in felony cases, if a respondent requests State-assigned counsel and has no money with which to employ counsel of his own, the Court will always appoint an attorney to represent him. In 1961 the Vermont Legislature passed a law . . . providing that whenever a minor is charged with a felony in any court he *shall* be represented by counsel, (13 VSA, § 678)."

APPENDIX II

This appendix consists of extracts from correspondence with British law teachers and practitioners regarding the practice of furnishing legal aid to indigent criminal defendants in Great Britain.

Letter from G. S. Wilkinson, clerk to the Justices, City of Cambridge, to Dr. Glanville Williams, Fellow, Jesus College, Cambridge, Aug. 18, 1962, (Dr. Williams was good enough to pass my questions to him on to Mr. Wilkinson): "Where a person is committed for trial to Assizes or Sessions on a charge which is not murder, he should be granted a defense certificate if the court is satisfied that he means to plead not guilty. In my experience this is generally done though there may be magistrates' courts where a desire to save public money or a belief that the defence will

not be a 'bona fide' one may persuade magistrates not to grant it. Such conduct by magistrates, of course, would be improper. If a person to be so committed says he is going to plead guilty . . . magistrates have been directed by Lord Parker, the present Chief Justice, that they should nevertheless grant a certificate.³⁶⁸ Lord Goddard, the former Chief Justice, held the opposite view. . . . [T]he basic practice which magistrates have been directed to follow is that counsel should always be provided in all cases sent to Assizes or Sessions, whatever the maximum punishment. Some courts offer a defence certificate without its request and notices about legal aid are posted up in the courts and sometimes given to accused persons at the police-station. Other courts may not be in the habit of offering legal aid spontaneously. . . . Of course, legal aid will also generally be granted, if requested, in cases which are not being sent to Assizes or Sessions but are being tried by the magistrates, if the cases are serious. or the court may offer it. Again, it can be granted for the preliminary hearing in a magistrates' court of a case which is to be sent to the Assizes or Sessions. . . . The right never terminates. I have known legal aid to be granted where a point of law arises during the trial of an unrepresented defendant, the trial being adjourned while a lawyer is instructed. . . . The police, in my experience, never oppose the grant of legal aid, or even offer observations about it. They co-operate in telling the accused of his rights by handing him the leaflets [informing him of legal aid services]. I have occasionally known an officer to say that the accused has no means to pay a lawyer, i.e., the officer has volunteered the information."

Letter from Professor Graham Hughes, Department of Law, University College of Wales, July 10, 1962: "Here you must remember that legal aid is not confined to trials on indictment or to indictable offences but extends to summary trials as well. So there is no general principle of demarcation as to the gravity of the offence. I would say that in practice the real question is usually the question of the accused's financial ability. If he can convince the court that there is financial need then legal aid may be forthcoming even for a comparatively trivial offence. . . . There are notices in all courts informing the accused of his right to make an application. In fact, there are quite a number of cases where legal aid is offered by the court in the absence of an application by the prisoner. . . . [T]he applicant may apply by letter for legal aid before he appears at all in the magistrates' court. If he does not do this he may apply at his first appearance before the magistrates. If the magistrates have not granted legal aid and the accused goes on to trial or indictment it is possible for Quarter Sessions or Assizes to ask counsel to undertake his defence without issuing a certificate. The right to legal aid continues until the termination of the last possible appeal."

Letter from Victor Tunkel, Lecturer, Faculty of Law, University of Bristol, Aug. 5, 1962: "In my experience (which is of the practice in London) an accused who is committed for trial by a magistrates' court and whose means do not allow him to provide for his own defence may ask the magistrates for a *defence certificate*. The accused will have to complete a form stating his means etc., but subject to this a certificate is usually granted. It may well be that the accused will already be represented before the magistrates under a *legal aid certificate*, so that his lawyer will make the request on his behalf. I have myself made many such applications and, subject to means, never known one refused.

³⁶⁸ See note 69 *supra*.

"Should no application be made by the accused or on his behalf, it is often the practice for the magistrates to offer this facility, at least in cases where he is pleading not guilty. There are, of course, notices displayed in courts drawing the attention of accused to their rights.

"In this way the majority of poor prisoners will be represented by properly instructed counsel when they come up for trial; failing which the trial court will itself grant defence certificates in appropriate cases.

"As to the basic practice, I do not think anything turns on the distinction between felony and misdemeanour or length of sentence possible. Most indictable offences involve the jeopardy of at least six months imprisonment and this is felt to be more than ample justification for a grant of legal representation. Legal aid in criminal cases has not been so much in evidence as formerly, perhaps, but then neither has poverty.

"Perhaps I also ought to mention in this context the two other methods of granting legal aid in trials on indictment. Firstly, there is the occasional practice of a trial judge requesting a barrister present to undertake the defence of an unrepresented prisoner (see Poor Prisoners Defence Act, § 3(3)). Secondly, the traditional method of the "Dock Brief" is still frequently employed. Any accused, of whatever means, having £2 4s 6d, is allowed to point to any robed barrister in court, who must then act for him.

"In short, I believe that legal aid of some sort is now available in the case of virtually all offenders tried on indictment who qualify for it financially. The most recent figures show that in 1961 over 14,000 applied for defence certificates and about 3,000 of these were refused. In addition about 900 prisoners were offered legal aid by the court concerned without their applying for it and of these all but 100 accepted it. A further 1,368 defences were undertaken at the request of the court under § 3(3). There are no figures for dock briefs.

"[I]t is less usual for a legal aid certificate to be granted for the preliminary enquiry (3,300 certificates granted out of 35,000 preliminary enquiries in 1961; 44 murders).

"I should not be giving a complete account if I failed to mention the legal *advice* scheme whereby oral advice on legal matters is available free or at a nominal charge, subsidised by the Legal Aid Fund. It may well be that some persons anticipating criminal proceedings avail themselves of legal advice in this way from the outset.

"Since barristers have exclusive right of audience in the superior courts, but may not act unless instructed by a solicitor, it follows that in all the cases mentioned, both barrister and solicitor are provided. To this there are certain exceptions:

"(a) Save in the case of murder, a legal aid certificate provides the services of a solicitor only. (Since, however, this is not a trial but a preliminary enquiry and in an inferior court, it is not really an exception).

"(b) In the "Dock Brief" procedure, the barrister has to act as his own solicitor.

"(c) On a charge of murder, or in a case likely to present exceptional difficulty, a defence certificate will be granted certifying for two barristers plus, of course, a solicitor. (148 such in 1961)."

Letter from Professor G. H. Treitel, Magdalen College, Oxford, relaying answers to my questions furnished him by W. A. B. Forbes of the London Bar, July 30, 1962: "Counsel is quite often provided even where the accused has pleaded guilty,

in order to make a plea in mitigation on his behalf. Speaking generally, legal aid is provided whenever it seems likely that the accused may be sent to prison, and when he has no means to pay for legal aid himself.

"The prisoner requests legal aid; but he is almost invariably invited to do so by the court.

"Legal aid continues (subject to the discretion of the court) until the end of the proceedings. If a convicted person appeals, he will usually get legal aid for the appeal.

"The police . . . often tell poor prisoners to apply for legal aid."

Letter from Professor A. D. Armitage, President, The Lodge, Queens' College, Cambridge, July 13, 1962: "The Lord Chief Justice recently stated that Legal Aid should be granted whether there is a plea of guilty or not. In Magistrate Court cases the practice is to grant Legal Aid in any case which appears to be serious or to contain any point of difficulty. In serious cases in my area notice is given to the accused at the Police Station setting out the provisions for Legal Aid. The right to assistance begins at the first Court appearance both in murder cases and in special cases."

Letter from Professor Patrick Fitzgerald, Faculty of Law, University of Leeds, Leeds, Aug. 7, 1962: "The basic practice is not that counsel is provided only in felony cases but rather that counsel is provided in all serious cases (whether felony or misdemeanour).

"The practice in this matter is not rigid and the magistrates and trial courts provide legal aid in cases of gravity and in cases where there is either a substantial defence or where there are good grounds for mitigation.

"The popular attitude so far as there is one is that poor prisoners who have the misfortune of being prosecuted should be assisted to make out their defence. Popular misgivings about the cost of criminal cases really arise on a rather different matter. There is some indignation that the accused person who pays for his own defence and is then acquitted is not usually able to recover the costs of his defence."

I am also indebted to Professor S. H. Bate, Faculty of Law, the University of Birmingham, for sending me various legal aid forms; and to Professor Treitel and Mr. Forbes for sending me several booklets.